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MT LEGISLATIVE HISTORY

Chapter 496 1985

Bill H _____ (S) 152 Original bill & hist. ___C

H. Committee on Judiciary		S. Committee on Judiciary	
Hearing Date(s) MAR 22	✓C	Hearing Date(s) JAN 30	✓C
_____	___C	FEB 09	✓C
_____	___C	_____	___C
_____	___C	_____	___C
Date Out MAR 22	✓C	FEB 09	✓C

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

Senate BILL NO. 152

INTRODUCED BY Bob Brown

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE A PRESUMPTION IN FAVOR OF JOINT CUSTODY UNLESS IT IS SHOWN THAT THE CHILD'S WELFARE IS ENDANGERED; PROVIDING FOR EQUAL SHARING OF RESIDENCY TIME WHEN PRACTICAL; AMENDING SECTION 40-4-224, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 40-4-224, MCA, is amended to read:

"40-4-224. Joint custody -- modification -- consultation with professionals. (1) Upon application of either parent or both parents for joint custody, the court shall ~~consider--whether--or-not~~ presume joint custody is in the best interests of a minor child unless it is shown by clear and convincing evidence that the child is in danger of serious emotional or physical harm if left in the joint custody of both parents. If the court declines to enter an order awarding joint custody, the court shall state in its decision the reasons for denial of an award of joint custody.

(2) For the purposes of this section, "joint custody" means an order awarding custody of the minor child to both parents and providing that the residency of the child shall be shared by the parents in such a way as to assure the child frequent and continuing ~~(but-not-necessarily-equal)~~ contact with both parents. When practical, this time allotment must be equal.

(3) Any order for joint custody may be modified pursuant to 40-4-219 to terminate the joint custody.

(4) The court may with the consent of both parties, at any time, direct the parties to consult with appropriate professionals for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy that has arisen in the implementation of a plan for custody."

NEW SECTION. Section 2. Effective date. This act is effective on passage and approval.

-End-

STANDING COMMITTEE REPORT

HOUSE

March 22 19 85

MR. Speaker

We, your committee on Judiciary

having had under consideration Senate Bill No. 152

Third reading copy (Blue color)

PRESUMPTION IN FAVOR OF JOINT CUSTODY EQUAL RESIDENCY TIME

Respectfully report as follows: That Senate Bill No. 152

be amended as follows:

1. Page 1, line 21.
Following: "40-4-212"
Strike: "BY" through "EVIDENCE" on line 22.

2. Page 2, line 7.
Following: "that the"
Insert: "physical custody and"

3. Page 2, line 8.
Following: "be"
Strike: "shared by"
Insert: "allotted between"

4. Page 2, line 18.
Following: "may"
Strike: "with" through "parties"

~~DO PASS~~
~~XXXXX~~
AND AS AMENDED,
BE CONCURRED IN

AMA 3-22-85 KMF

Tom Hannah

REP. TOM HANNAH, Chairman.

SENATE BILL NO. 152

INTRODUCED BY B. BROWN

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE A PRESUMPTION IN FAVOR OF JOINT CUSTODY ~~UNLESS IT IS SHOWN THAT THE~~ IF IN A CHILD'S ~~WELFARE IS ENDANGERED~~ BEST INTERESTS; PROVIDING STANDARDS FOR ~~EQUAL SHARING OF~~ ESTABLISHING RESIDENCY ~~TIME WHEN PRACTICAL~~; AMENDING SECTION 40-4-224, MCA~~, AND PROVIDING AN IMMEDIATE EFFECTIVE DATE~~."

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(2) For the purposes of this section, "joint custody" means an order awarding custody of the minor child to both parents and providing that the PHYSICAL CUSTODY AND residency of the child shall be shared by ALLOTTED BETWEEN the parents in such a way as to assure the child frequent and continuing ~~(but not necessarily equal)~~ contact with both parents. ~~When practical, this time allotment must be equal.~~ THE ALLOTMENT OF TIME BETWEEN PARTIES SHALL BE AS EQUAL AS POSSIBLE; HOWEVER, EACH CASE SHALL BE DETERMINED ACCORDING TO ITS OWN PRACTICALITIES WITH THE BEST INTERESTS OF THE CHILD AS THE PRIMARY CONSIDERATION.

(3) Any order for joint custody may be modified pursuant to 40-4-219 to terminate the joint custody.

(4) The court may ~~with the consent of both parties~~, at any time, direct the parties to consult with appropriate professionals for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy that has arisen in the implementation of a plan for custody."

~~NEW SECTION. Section 2. Effective date. This act is effective on passage and approval.~~

REPORT L

MONTANA LEGISLATIVE ' L BILL STATUS SYSTEM
FINAL COMMITTEE ' ORT OF REFERRED BILLS
COMMITTEE--(S) JUDICIARY

PAGE NBR..... .03
RUN TIME ..... :8:07
RUN DATE.... 04/29/85

CHAIRMAN--MAZUREK, JOE
SECRETARY-STALEY, CINDY
NORMAL SCHEDULE==> SITE: OLD SUPREME COURT ROOM DAYS: M-TU-W-TH-F TIME: 10:00 A.M.-12 NOON

--BILL NO---	REFER DATE---	HEARING DATE---	CONSIDERATION DATES----------	COMMITTEE ACTION----------	REREFERRED TO COMM----	DATE OUT-
SB0151	1/18	2/01		DO PASS		2/4
BROWN, BOB			INCREASE SENTENCE DEFERRAL PERIOD IF A FINANCIAL OBLIGATION IS IMPOSED			
SB0152	1/18	1/30		PASS AS AMENDED		2/9
BROWN, BOB			PRESUMPTION IN FAVOR OF JOINT CUSTODY EQUAL RESIDENCY TIME			
SB0153	1/18	1/30	XXXX 2/23	TABLED		2/11
BROWN, BOB			REVISE SHOWING REQUIRED FOR TEMPORARY SOLE CUSTODY ORDER			
SB0179	1/22	2/04	XXXX 2/23	TABLED		2/4
GOODOVER, PAT M.			ADOPT EXCLUSIONARY RULE EXCEPTION AND MANDATE RESTITUTION TO CRIME VICTIMS			
SB0184	1/22	2/12		DO PASS		2/12
MAZUREK, JOSEPH P.			REMOVE SUNSET ON DAMAGE LIMIT IN SUITS AGAINST STATE-LOCAL GOVERNMENTS			
SB0185	1/22	1/29		PASS AS AMENDED	JUDICIARY	1/31
HIRSCH, LES J.			REVISE FEE ALLOWANCE ON DISCONTINUANCE OF FORECLOSURE - SM TRACT FINANCE ACT			
SB0185	2/04			PASS AS AMENDED		2/6
HIRSCH, LES J.			REVISE FEE ALLOWANCE ON DISCONTINUANCE OF FORECLOSURE - SM TRACT FINANCE ACT			
SB0186	1/22	2/06		PASS AS AMENDED		2/9
HIMSL, MATT			SENTENCING GUIDELINES COMMISSION ACT			
SB0200	1/23	2/05	2/11	PASS AS AMENDED		2/18 twice
CHRISTIAENS,B.F. CHRIS			LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS			
SB0206	2/11			PASS AS AMENDED		2/22
HAFFEY, JACK			REVISION OF FILING SECURITY INTERESTS IN MOTOR VEHICLES			
SB0217	1/23	1/31	2/16 2/19	PASS AS AMENDED		2/22
TOWE, THOMAS E.			REQUIRING ESTABLISHMENT OF MUNICIPAL COURTS IN CERTAIN CITIES			

CLOSING STATEMENT: None.

Hearing on HB 88 was closed.

CONSIDERATION OF SB 152 AND SB 153: Chairman Mazurek stated the hearings on SB 152 and SB 153 would be held simultaneously since the bills were similar and on the same topic. Senator Bob Brown, sponsor of both bills, stated neither bill is very complex in terms of what it does, but the impact of the bills might be great. On SB 152, the change occurs on page 1, section 1, where we establish a presumption be made in favor of joint custody in cases of divorce. Senator Brown related statistics which were presented to him indicate 70% of the child support payments in the United States are in arrears or are not being made, but in cases of joint custody, the child support payments are much better. The way it is now, we start with the presumption joint custody is in the best interests of the child. He believes when practical, the time allotment should be equal. SB 153 changes the burden of proof as it is in the existing law for temporary custody. Again, we start with the joint custody concept.

PROPONENTS: Douglas E. Grob, a member of the Governor's Commission on Child Support Enforcement Council from Kalispell, presented testimony in support of the bills (see Exhibit 1). He stated child support is a new concept, and the research data is just starting to come in on it. He believes the right to joint custody is fundamental and can be overridden only if there is a chance of harm. Mr. Grob questioned why if you have equality of parenting in the beginning and that is what they share at the time of divorce, why we granted the state the right to interrupt that at divorce. He believes the right is so basic or essential, the state must have a compelling interest to override it. His statistics indicated there is a 72% default rate on child support payments when the father is not involved and 6-7% when he is. He believes there has to be a fair sense of physical custody and not just joint custody. He stated the critical issue here is the right of Montana's children to deal with both of their parents. He does not believe a good relationship between husband and wife is necessary to good joint custody. In Montana, the main reason joint custody is not handed down by the judge is because the mother does not want joint custody. If the judge presumes joint custody, then you must prove tp tje cpirt that either parent can be harmful. People do not tend to be cooperative in divorce. Gary Boe from Kalispell appeared in support of the bills. He is a joint custody father. At the present time, his child spends an equal amount of time with both parents. His child lives 1,000 miles away and goes to school here half the time and there half the time. His child has a good scholastic aptitude. He is doing very well in school and is very well adjusted. He loves both parents. Mr. Boe stated he is an excellent citizen who was becoming a disenfranchised father, but he had to sell the court on the fact he was

a good father and had to refute the allegations against him that he wasn't a good father. Bill Riley from Helena appeared in support of the bills (see Exhibit 2). Jerry O'Neil from Kalispell appeared in support of the bills. He was awarded full custody after a lengthy divorce. He still has full custody, but he and his ex-wife basically share joint custody. Full custody was causing a continued fight between he and his ex-spouse. With sharing the children, they are no longer afraid they won't get the children back. He believes any award of full custody is normally viewed as a loss to the other parent. It is in the best interests of the child to know both parents. He feels the parents have a lot more power to change the terms of joint custody than they do with full custody. Maurene Kleary of Helena appeared in support of the bills. She has been actively involved in sharing custody with her son's father. She believes children have a right to know both parents. Parents need to remember the children's rights. Tom Pouliot appeared in support of the bills (see Exhibit 3). He wants the committee to add a provision for child support to the bill. In joint custody orders he has seen, there is no provision for child support. In his job, he has seen this create problems at a later time. As time goes on, one parent or another gains physical control, and if that parent needs assistance, he/she must go back to court or often one parent or the other is seeking AFDC. He would ask that this committee consider adding a provision where in essence we are alerting the judges the parties, and the lawyers that a provision for child support ought to be considered in temporary and joint custody situations.

OPPONENTS: Anne Brodsky, representing the Women's Lobbyist Fund, appeared in opposition to SB 152 and SB 153. They don't disagree with the intent of the bills or the people that have spoken today. They also perceive joint custody to be the ideal situation. However, they feel these bills create a problem. They question what will happen to the mother who files for divorce but cannot afford an attorney. They wonder if the child's best interests are being used as a bargaining chip if the child's best interests are not automatic. What does equal time mean if it is not in the child's best interests? With regard to SB 153, they believe shifting away from looking at the child's best interests is not the way to go. Temporary orders arise either when both parties are seeking them or when there is a real serious problem. They are not convinced all of the ramifications of these bills have been thought through. There may be problematic legal assumptions that work against joint custody. They believe there are barriers to joint custody which are not necessarily with the present law, nor will they be improved by these bills. If there are presumptions for joint custody that would not impair the child's best interests, they may support these bills at that time.

ADDITIONAL TESTIMONY: Joan Uda, an attorney from Helena, spoke as a proponent of joint custody, though with some serious concerns about

SB 152. She encourages her clients to seek joint custody whenever possible. Her initial reaction is when we drafted the joint custody statute as it appears, it was presented to the legislature with a presumption of joint custody. With more experience with working with it, she finds one of the enormous advantages to joint custody is it gives lawyers additional flexibility in trying to problem solve for divorcing families. Ms. Uda believes if we are going to mandate equal time, judges will veer off in that direction, and we will be locked into something else and will have lost some of our flexibility. It is tragic for a child to lose one of his parents, and we have done that so casually in the past. We should try to make our judges realize sole custody and joint custody stand on an equal footing. Just because one parent says they don't want it, that should not be enough. She is afraid the presumption will stimulate more fights. It is a new area of the law; it is developing; as we go, mistakes are made. She agrees with the Department of Revenue's position that every order should deal with child support in some manner. The thing she wants to say is that an attorney trying to work with people trying to resolve these problems should have as much flexibility as possible. She urges the committee to remove the equal time provision and put joint custody on an equal footing with sole custody, but she does not think it is appropriate at this time to make it a presumption. Regarding SB 153, she thinks the law is adequate at this time. She is very concerned with page 2, lines 8-11, as they don't use joint custody unless there is a real need for it. In the rare cases where there is need for some action, this bill will make it even more difficult.

QUESTIONS FROM THE COMMITTEE: Senator Yellowtail stated everyone seemed to agree that there is a judicial bias and questioned where that came from. Mr. Grob stated an overview of divorce was a separation of the relationship and, therefore, the children got separated with it. Ms. Uda stated it is simply new. There is still a lot of reluctance because the evidence is not all in. There is also a resistance to change in legal areas. It is always important when we are moving forward with a solution to a problem to be sure the solution does not cause more problems than it solves. Senator Yellowtail asked Ms. Uda what the ultimate end of that education process. Ms. Uda stated her concern is that if we make it a presumption, we are going to impart it in situations where it doesn't belong. We have to keep in sight we are talking about children and it is not always best for children; it is moving too fast. Senator Mazurek stated he did not have trouble with the presumption, but he did with the standard being endangered. He asked Ms. Uda what she felt about keeping the presumption but have a lesser evidentiary requirement. Ms. Uda stated that maybe a presumption with a lesser standard would work. She thinks the best interests of the child is legal gobbledygook, but it's the best gobbledygook we have, and we still have to keep the children at the center of that. She thinks we should

make the court consider it first, and then if someone can show it is not in the best interests, not use it. Ms. Kleary stated "in the best interests of the child" is a very vague statement to her. Mr. Riley stated the bottom line is if we don't change the presumption, we will operate on the old presumption as we rely on the education process, we will lose too much before we reach the goal we are after today. Senator Yellowtail stated best interests is ambiguous but that should be the point. Research shows it is in the best interests of children to have joint custody and how do we for the sake of law respond to that. Senator Mazurek responded although those are vague and ambiguous terms, there is a pattern of case law interpreting them, as well as what constitutes serious emotional harm. It is virtually impossible except for a physical abuse problem to change the degree. Right now all the court has to do is look at joint custody. He believes you jeopardize the possibility of the bill's passing if you insist on the endangerment. Mr. Grob wants no child in physical harm, but does not want to see children alienated from half of their biological inheritance.

CLOSING STATEMENT: Senator Brown stated the bill would create a presumption which would not always work in the best interests of the child, but joint custody seems to be in the best interests of the child nearly all of the time, so we should begin with the presumption of what is in the best interests of the child and hopefully support payments will be paid better. He would be happy to work with Ms. Uda to see if there's a way to soften that standard and still see that joint custody works out.

Hearing on SB 152 and SB 153 was closed.

There being no further business to come before the committee, the meeting was adjourned at 11:38 a.m.

Committee Chairman

A PRESUMPTION OF JOINT CUSTODY, CONSTITUTIONALLY GUARANTEED

A Nonprofit Association concerned with the joint custody of children and related issues of divorce, including research, information dissemination and legal and counseling practices

THE JOINT CUSTODY ASSOCIATION

10606 Wilkins Avenue
Los Angeles, California 90024

James A. Cook
President

June 11, 1982

1

Overridden only with evidence of "harm"

Equality of basic rights

retained by joint custody

Rationale *

Joint custody: A constitutionally mandated presumption which follows as a corollary to the fundamental right of parental autonomy.

Parental autonomy as a fundamental right proceeds logically from those cases securing to individual parents the right to participate in the control of their minor children.

Each parent has this right equally prior to divorce.

The equality of rights between the parents should be retained after divorce.

Joint custody is a mechanism for retaining this equality.

- - - - - - - - - - -

The right to joint custody is fundamental.

The state may override it only if it has a compelling interest in so doing.

Contrary to common assumption, the pursuit of the "best interests of the child" cannot function as a compelling state interest in this context.

The only defensible compelling state interest is more limited in scope: prevention of harm to the child.

"...the presumption of sole custody...is that one parent alone, rather than both parents together, should have custody of the children following a divorce."

Marriage of Pergament, 28 Or. App. 459, 462, 559 P.2d 942, 943 (1977) ("When a family is split by dissolution of the marriage the child of necessity can be in custody of only one parent and the custodial parent is given the primary responsibility for rearing the child.")

EQUALITY OF PARENTS

"Yet, if the positions of the two parents are indeed equal, then neither parent alone should be presumed to have a right to sole custody. The equality of

* All of the following material was derived solely from, and is to the credit of, Ellen Canacakos, Articles Editor and author of "Joint Custody As A Fundamental Right" published in the Arizona Law Review, Vol 23, No 2, 1981 University of Arizona Law College, Tucson Arizona 85721.

You are particularly referred to the original published article from which these quotations have been excerpted.

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each parent's right to custody should be reflected in a presumption of joint custody--a presumption to be rebutted only by such factors as harm to the child."

The requirement of proving harm is often employed in proceedings where the state seeks to terminate the rights of a parent. Roe v Conn. 417 F. Supp. 769, 776-79 (M.D.Ala. 1976); Alsager v District Court, 406 F Supp. 10,23, 24 (S.D. Iowa 1975) aff'd, 545 F 2d 1137 (8th Cir 1976). The harm standard applies to custody proceedings where the state is seeking to assume custody. "Best interests" is appropriate where the parties have an equal right to custody, such as divorce. 417 F. Supp at 779 n. 12.

FAIRNESS CONSTITUTIONALLY MANDATED

"..what seems intuitively fair -- that the recognition of equal parental rights reflected in a presumption of joint custody--is constitutionally mandated."

"...a presumption of joint custody proceeds logically from each parent's fundamental right of parental autonomy. The Supreme Court has acknowledged that the relationship between parent and child and other relationships within the family enclave are constitutionally protected from state intrusion."

Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v Illinois, 405 U.S. 645, 651 (1972)

CONSTITUTIONAL PROTECTION OF FAMILY RIGHTS DERIVED FROM INDIVIDUAL RIGHTS

"If constitutional protection of parental rights depends upon the continued existence of the nuclear family unit, then dissolution of that unit by divorce would make constitutional protection of those rights inapposite. If, however, the protection afforded the nuclear family unit derives from the individual rights of those within the family, then application of the best interest of the child standard in adjudicating child custody pursuant to a divorce may contravene constitutionally protected parental rights. The following section will demonstrate that such protection derives not from the family unit per se but from the rights of individuals within the family."

FUNDAMENTAL RIGHT OF PARENTAL AUTONOMY

these cases establish what will be called a "fundamental right of parental autonomy" -- the right to participate in the basic decisions that affect the life, nurture, and welfare of one's children.

..each parent enjoys this right equally, independent of the confines of the traditional nuclear family setting.

..unless one parent consents to the other's custody of the child, the parents' respective rights will appear to conflict with one another in a subsequent adjudication of child custody.

This conflict may be resolved by a presumption of joint custody -- no other presumption being consistent with the equality of the rights established."

FUNDAMENTAL RIGHT DEFINED

"..a fundamental right is defined as the following: a right so basic or essential that the state must have a compelling interest to override it."

Roe v Wade, 410 U.S.. 113, 162-63 (1973); Dunn v Blumstein, 405 U.S. 330, 342.

(The state) "must,..use the least restrictive means possible to secure the com ling interest."

The least restrictive alternative doctrine: Shelton v Tucker, 364 U.S. 479, 488 (1960) ..purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be...the least drastic means for achieving the same basic purpose."

"..it is important to note that fundamental rights belong to individuals, not groups or abstract entities."

Roe v Wade, 410 U.S. 113, 153 (1973); Eisenstadt v Baird, 405 U.S. 438,453 (1972) "..the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.")

"An individual may acquire a certain right (e.g., a right of parenthood) by vi of a certain relationship (e.g., biological parenthood)"

"The family, then, is protected because the relationships it contains are deem worth protecting. These relationships are deemed worth protecting because they are presumed to be important to the integrity and welfare of the individuals w are parties to them."

Smith v Organization of Foster Families for Equality & Reform, 431 U.S. 816, 860-63 (1977) (Stewart, J., concurring); Moore ve City of E. Cleveland, 431 U.S. 494, 499 (1977), and Stanley v Illinois, 405 U.S. 645, 651 (1972)

SUPREME COURT DECLARES PARENTAL RIGHTS FUNDAMENTAL

"although the right of parental autonomy is not specifically mentioned in the Constitution, the Supreme Court cases dealing with parental rights suggest tha they are so basic that they must be regarded as fundamental."

Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Poe v Ullman, 367 U.S. 497,551-52 (1961) (Harlan, J., dissenting); Prince v Massachusetts, 321 U.S. 158, 166 (1944) To Justice Goldberg, "(t)he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of a similar order and magnitude as the fundamental rights specifically protected." Griswold v Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

THE INDIVIDUAL'S RIGHT TO BRING UP CHILDREN

"..the "liberty" guaranteed by the fourteenth amendment protects the right of individual "to marry, establish a home and bring up children..."

262 U S. 390 (1923) at 399

PARENTS' RIGHT TO BE FREE OF STATE INTERFERENCE

"The Court based its decision on the parents' due process right to be free fro unreasonable state interference in raising their children as they saw fit."

268 U.S. 510 (1925) at 534-35

ESTABLISHMENT OF PARENTAL RIGHT AS AN AMERICAN TRADITION

"..the Court noted (in Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)) that "(t)he history and culture of Western civilization reflect a strong tradi of parental concern for the nurture and upbringing of their children. This pri role of the parents in the upbringing of their children is now established bey debate as an enduring American tradition."

268 U.S. 510, 535 (1925) at 232

"The Meyer-Pierce-Yoder line of cases make it clear that parents have a fundam tal right to direct the upbringing of their minor children.

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RIGHTS OF A FATHER TO RAISE HIS CHILDREN

"What remains to be examined..is whether these parental rights exist only when the parents are united in a traditional nuclear family or if these rights can still be present independently of such a structure.

"The Supreme Court addressed that question in Stanley v Illinois, 405 U.S. 645 (1972) (Constitutionality of a state adoption statute that upon the death of their mother, an illegitimate child becomes a ward of the state without a hearing on the parental fitness of the biological father. (405 US 645 (1972) at 646-48.

"The Court stated: The private interest here, that of a man in the child he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.

"..the Stanley case recognized the right of the biological father, absent a showing of unfitness, to continue to raise his children even though the traditional bond of marriage was absent in this family setting. (405 US 645 (1972) at658.

THE BIOLOGICAL RELATIONSHIP AS A BASIS FOR CONSTITUTIONAL PROTECTION

""The importance of a biological relationship as a bsis for extending constitutional protection was made clearer in Moore v City of East Cleveland, 431 U.S. 494 (1977): 'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."

"Stanley and Moore thus suggest that relationships linked biologically or occupying a place in the American tradition functionally similar to that of the nuclear family are constitutionally protected from state interference."

PROTECTING INDIVIDUAL RIGHTS CHARACTERISTIC OF THE FAMILY

"Quilloin, like Stanley, involved an unwed father's parental rights.....the Court is not concerned with protecting families per se but with protecting individual rights grounded in certain relationships characteristic of the family.

"..the relationship between a divorced parent and his or her child is entitled to such constitutional protection.

"..the divorced parent typically:
- possesses the necessary biological relationship stressed by the Stanley-Moore- Smith line of cases,
- has established the emotional ties singled out as controlling by the Court in Smith and Quilloin,
- has contributed the substantial support suggested as a relevant factor by the Court in Quilloin,
- has exercised actual or legal custody over the child as stressed by the Quilloin Court, and,
- finally, occupies a place in one of the most traditional relationships of all -- that of parent and child."

DIVORCE DOES NOT ACQUIRE A STRONGER RIGHT THAN JOINTLY EQUAL RIGHTS IN MARRIAGE

"In adjudicating child custody incident to a divorce,...The right of parental autonomy is not the right of each parent to total or final custody or control over the child.

But the conflict between them is by no means insolvable if we see the right to be not a right to total or final control but rather an equal right to share in the control of the child.

Since this is the strongest right possessed by either parent during the marriage s-a-vis the child, it would be odd indeed to imagine either acquiring an even stronger right after the dissolution of the marriage.

"..two crucial points emerge to resolve the conflict:

(1) The right of each parent must be regarded as equal with that of the other, and

(2) The right in question is a right not to total control but rather a rig to the same level of control that one had in the marriage -- a right to share in the control of the child.

WHAT LEGAL APPROACH SECURES THE RIGHTS EQUALLY?

"What legal approach to custody decisions will both secure the rights in questio and secure them equally for each parent?

- ..its answer is also obvious: a presumption in favor of joint custody (Burge v City of San Francisco, 41 Cal 2d 608, 616, 262 P2d 6,11 (1953 (Joint custody "gives neither (spouse) a greater right than he or she has before the divorce.")

"Such a presumption will come as close as possible to leaving the rights and obligations toward the child the same as those that existed during marriage." (Folberg & Graham, Joint Custody, 12 U Cal D.L. Rev 523, 525-26; Miller, Joint Custody, 13 Fam L.Q. (1979) at 355; Mnookin, Child Custody Adjudication: Judicia Functions in the Face of Indeterminancy, 39 Law & Contemp Prob, (Summer 1975) at 233.)

E JOINT CUSTODY RIGHT, UNLESS WAIVED BY A PARENT, OR COMPELLING OVERRIDING FAC

"The fundamental right to joint custody, like all rights, merely establishes a presumption--not an absolute and final determination in all cases.

-- it can, for example, be waived by a parent who does not desire custody.

-= Since the right is fundamental, however, it may be overridden by the stat only when the state possesses a compelling reason for doing so.

STATE MAY INTERFERE ONLY TO PREVENT HARM

"Since the state's right to interfere with these rights within the family is limited by a principle far more restrictive than "the best interest of the child' it is hard to see why state interference should become any less restricted after divorce. Normally the state may interfere with parental rights only to prevent harm or abuse to the child."

Justice Stewart has described the limits upon the power of a state to interfere in parent-child relationships as follows (Smith v Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-63 (1977): "One of the liberties protected by the Due Process Clause...is the freedom to establish a home and bring up children...If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'

"Why should a comparable limitation on state judicial power not be present after divorce as well? The court must require proof that the child would be harmed by joint custody, not merely that the child's interests might be better served without it.

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"Even in those cases where it is possible to prove that joint custody will result in harm to the child, the actual custody arrangement...should not be upheld unless it can be demonstrated that such an arrangement is "necessary" to protect the child from harm.

"Given this analysis, it is a mistake for courts to continue the tradition of focusing on the best interest of the child in making custody awards. Courts should, instead, concern themselves solely with one basic question: Is joint custody likely to harm the child? It would be much easier to support the claim that joint custody may not be in a child's best interest than to support the claim that joint custody is actually harmful.

"..to deny joint custody, it must be demonstrated that such a custodial arrangement would result in probable harm to the child."

IMPLEMENTATION OF "REBUTTABLE PRESUMPTION" JOINT CUSTODY STATUTE ENDORSE BY SENIOR FAMILY COURT JUDGE

Judge sees no reason to amend joint custody law

By ED CULLEN
Advocate staff writer

Louisiana's 4½-month-old joint custody law is proving helpful in getting parents seeking divorce to consider the welfare of their children first, senior Family Court Judge Donald E. Moseley said Wednesday.

There is a bill in the Legislature that would amend a 1982 act that expanded an earlier joint custody law in Louisiana. Moseley said he sees no need to amend the law at present.

Moseley was responding to a question during a talk at the Women's Resource Center.

Louisiana's first joint custody law was enacted in 1980. The law stipulated that both parties in a divorce case agree to joint custody before a judge could grant such custody. Under the 1980 law, both parents had to reside in the state.

The 1982 law, which didn't take effect until January of this year, removed the stipulations that both parents agree to joint custody and live in the state. The 1982 law also presumes that joint custody is in the best interest of the child, Moseley said.

Starting with that presumption is helpful in custody negotiations, Moseley said and often permits "settling it outside the courtroom rather than in a courtroom battle to the death."

Joint custody may be as flexible as it needs to be and doesn't hurt a mother's or father's case for sole custody, Moseley said. There are cases in which, early on, he realizes joint custody isn't the way to go, Moseley said. In cases where a parent is shown to be unfit, sole custody is the answer, he said.

Under present Louisiana law, a parent objecting to joint custody assumes the burden of proof that joint custody isn't in a child's best interest, Moseley said.

"Joint custody means whatever the parents want," he said. "It amounts to custody and access but doesn't stigmatize either party.

"The act is beneficial because it brings attention to the fact that the parents have to address custody," Moseley said.

In most cases, joint custody and a plan for how the custody is to work are arrived at simultaneously with the divorce, Moseley said.

A child's spending six months with each parent would be an unusual arrangement, Moseley said.

"I think it's best a child spend the school year in one home or the other and make adjustments for the summer and holidays," he said.

Regardless of the plan agreed upon for joint custody, the law breaks the ice in a divorce proceeding and gets the parents talking about the child, Moseley said.

Sometimes, it's the lawyer — not the parents — who must be sold on joint custody, Moseley said.

A parent could attempt to use joint custody to win a reduction in child support, but such a move would be obvious to the judge, Moseley said.

An "astute lawyer" might argue that a parent who objects to joint custody will be reluctant to grant reasonable access, Moseley said.

Moseley said he persuaded a lawyer to give joint custody a try only to have subsequent joint custody negotiation in the case reach the point of "blowing up." At that point, Moseley suggested sole custody might be the only solution.

"But judge, you're the one who talked us into joint custody," Moseley quoted the lawyer.

The case ended in joint custody.

A proposed amendment to the joint custody law sets forth factors to be considered by the court in determining whether joint custody is in the best interest of the child.

In East Baton Rouge Parish, Family Court judges offer the options of family counseling and Family Court staff investigations into the fitness of a parent, Moseley said.

"You have all the flexibility in joint custody you want," Moseley said. "There's no fixed formula. Both parents walk down the street with heads held high. There's no loser. No stigma.

"It impels the parties . . . It makes them wake up. What are we doing to the children?"

With no appellate decisions on the 4½-month-law, "we're sailing unchartered waters," Moseley said, but joint custody is an important option in the courts' attempts to recognize Americans' changing lifestyles.

Along with the traditional nuclear family, there is now a social unit that might be called "the reconstituted family" comprised of husband, wife and children from previous marriages, Moseley said.

Before joint custody, "we announced, in effect, the fictional death of the non-custodial parent," Moseley said.

"He became nothing more than a master of ceremonies" on weekend trips to the hamburger stand, the judge said.

Family Court Judge Donald E. Moseley

May 26, 1983, Baton Rouge, Louisiana, Morning Advocate

Abstract of the Dissertation

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EMOTIONAL ADJUSTMENT OF BOYS IN SOLE CUSTODY AND JOINT CUSTODY DIVORCES COMPARED WITH ADJUSTMENT OF BOYS IN HAPPY AND UNHAPPY MARRIAGES

Presented to the Faculty of the
CALIFORNIA GRADUATE INSTITUTE
In Partial Fulfillment
of the Requirements for the Degree
Doctor of Philosophy in Psychology

by

Everett Quentin Pojman
July 1981
Leo Weisbender, PhD, Dissertation Chairman

Introduction

Recently, joint custody of children has been tried by some divorcing parents as an alternative to the traditional sole custody. Theorists have conflicting opinions in terms of sharing custody. Some theorists believe that sole custody is the only healthy approach to child rearing following a divorce, whereas other theorists believe that joint custody is preferred. This research was an attempt to compare the emotional adjustment of boys in these two groups. Two other groups were used as controls to determine how these boys of divorce differed from boys living in families where marriages remained intact. These groups were happily married and unhappily married. The questions explored were: Is joint custody fostering a healthier post-divorce adjustment for children than sole custody? Is joint custody fostering a healthier adjustment for children than marriages where parents report an unhappy marital situation?

The hypotheses were:

1. Boys of happy marriages will have significantly better emotional adjustments than boys of joint custody.
2. Boys of happy marriages will have significantly better emotional adjustments than boys of sole custody.
3. Boys of unhappy marriages will have significantly better emotional adjustments than boys of joint custody.
4. Boys of joint custody will have significantly better emotional adjustments than boys of sole custody.

Review of the literature

The literature revealed that after parents divorce, their children generally go through a period of stress and adaptation which may continue long after the divorce. This stress may result in a trauma that often interrupts a child's emotional growth through developmental stages. Studies also support the importance of the involvement of the fathers with their children in order to facilitate healthy adjustment. Both joint custodial and sole custodial care have been reported with support from a theoretical and case study viewpoint, but no experimental research has been accomplished to compare the two types of living arrangements on the emotional effects for children.

Research design

A quasi-experimental study compared four groups of 20 boys between the ages of 5 and 13. Three of these groups were matched on demographic variables. Three

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different measurement tools were used to assess the boys: the Louisville Behavior Checklist (parents' rating), the Inferred Self-Concept Scale (teachers' rating), and the California Test of Personality (child's rating). The results of the rating scales were computed and each group was compared by a one-way analysis of variance.

Findings

Results supported the hypothesis that boys of happily married parents were significantly better adjusted on the California Test of Personality and the Louisville Behavior Checklist, respectively, than were boys of sole custody ($p < .01$)($p < .01$), and boys of unhappily married parents ($p < .01$)($p < .01$). However, no significant difference was reported for the Inferred Self-Concept Scale. Boys of happily married parents also demonstrated significantly better adjustment on the Social Adjustment part of the California Test of Personality ($p < .01$), and on 4 of 12 subtests within the same test when compared to boys of joint custody. No significant differences were reported on the other two instruments. It was demonstrated that boys of joint custody were significantly better emotionally adjusted than boys of sole custody and the unhappily married group on both the Louisville Behavior Checklist (p .01). There were no significant differences on any total test or subtest between boys of sole custody and boys of unhappily married parents.

Conclusions

Hypothesis 1 was partially accepted while Hypotheses 2, 3, and 4, were fully confirmed. The results of this study indicate that boys of joint custody are better adjusted than boys of sole custody and boys of parents who are unhappily married. The research also demonstrated that sole custody divorce has no more adverse emotional effects on a child than living in a home where the parents are unhappily married. Conversely, the results support the possibility that a situation could improve with a change from an unhappy marital situation to a joint custodial divorce situation.

REACTIONS BY CHILDREN TO SOLE PARENT CUSTODY

1. Feelings of loss and abandonment.
2. Attachment and separation anxiety.
3. Loyalty conflicts, particularly among latency-age children (5 to puberty)
4. Strained interactions with custodial and non-custodial parents.
5. Disturbance in children's play and social relations.
6. Disturbance in cognitive performance and changes in IQ.
7. Confusion in sex role identification.

The Sacramento Bee

Tuesday, November 18, 1980

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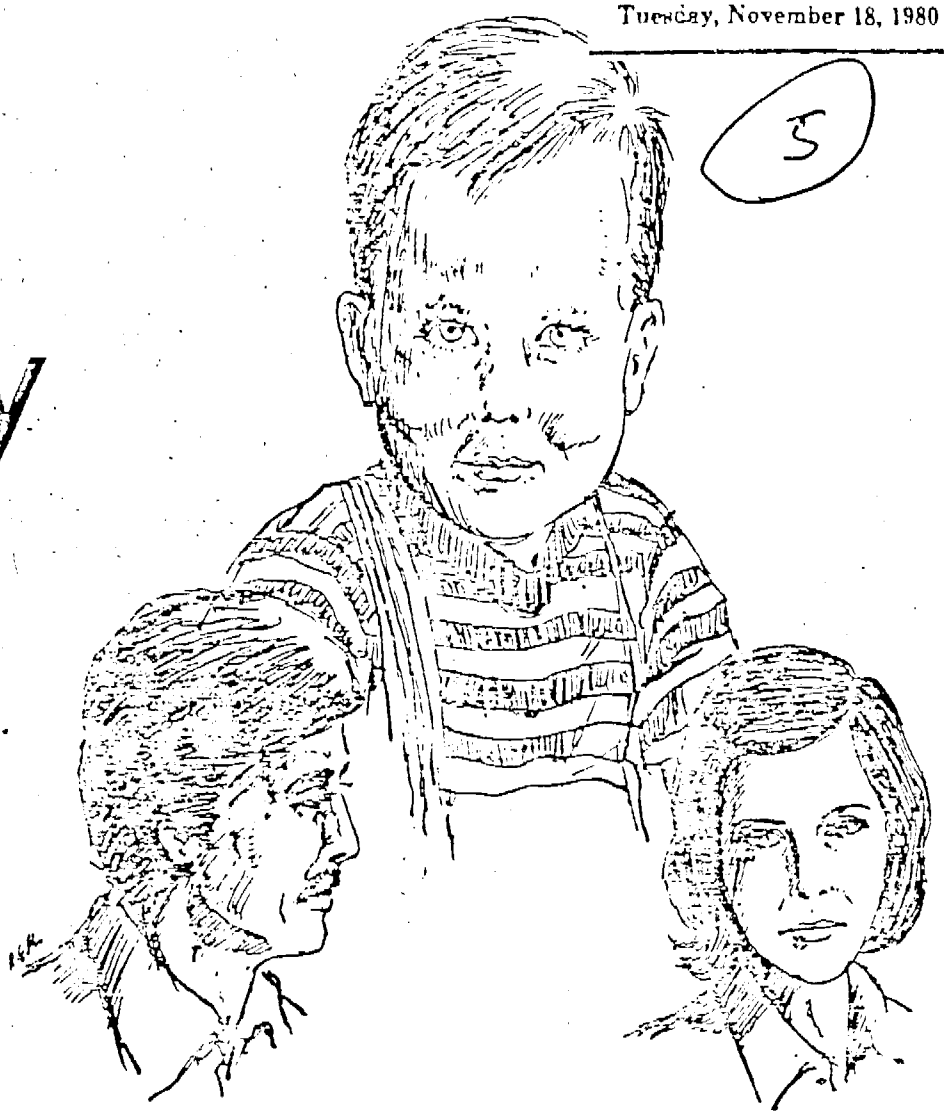
Joint Custody

After 11 months, how is the new law working?

By Kathryn Baker
Bee Staff Writer



"IF YOU HAD TOLD ME a year ago that I'd like joint custody, I would have told you, 'You're a fool!'" laughed Evelyn.

Elsewhere, Barbara declared: "We can deal with each other on a business-like basis, cooperating in a parental way — as long as we keep our personal relationship out of it."

Evelyn and Barbara are two Sacramento mothers who were forced by their ex-husbands, who had the law on their side, to share the physical custody of their children.

After their marriages ended in shards, both women, fearing that frequent contact with their ex-mates would only bring renewed warfare, rejected their husbands' demands to share custody of the children. Yet today both Barbara and Evelyn (not their real names) are champions of joint custody, which became California law in January. There are others who think the joint custody law has worked well in its first 11 months; a few others think it's too early to say.

Hugh McIsaac, president of the Association of Family Conciliation Courts, says "the major effect of the joint custody law is that it helps kids go through divorce. In 80 percent of the cases, kids break up over the parent who is out of the home. It is critical to maintain that contact." The thrust of joint custody, McIsaac explains, is "how can both of the parents, in a way that makes sense, bring this child to maturity as a healthy, caring human being?"

Although the following two true stories involving Sacramento families are not intended to be representative of all the ramifications of joint custody, they illustrate the power of the law to convert solid resistance to staunch support for a radical change affecting the children of divorce.

One afternoon in July, 1976, before her husband came home from work, Evelyn packed up her four-year-old son and walked out of a seven-year marriage. Angry and bitter after years of battling, she wanted nothing more to do with her husband.

She filed for divorce. Despite her husband's protests, she was awarded sole custody. Her husband, Ellis, a communications technician, was required to pay $250 a month alimony, $250 a month child support and was given visitation rights every other weekend and alternate holidays.

"I wanted custody at that time, but didn't have a chance," recalls Ellis. Last fall, anticipating passage of the joint custody law, he began proceedings for modification of his custody decree.

IN MARCH, Evelyn and Ellis met with a Family Court Services counselor to mediate the dispute.

Evelyn, who had never heard of joint custody, arrived ready to fight again for sole custody. "When Ellis walked in with a petition and plan for joint custody, I hit the roof. I had sole custody and I intended to keep it.

"I thought, 'I'm not going to put the kid through this.' Our son, Bobby, had had psychiatric therapy, and I felt that the arrangement Ellis was asking for, one week with him and one with me, wouldn't be good for him." She also objected to Ellis' demands that he meet and approve all babysitters and that she have no men in the house.

The counselor asked Evelyn, "What would be a reasonable joint custody arrangement for you?"

"'I haven't given it a thought,'" Evelyn replied testily. "All I could think of was that joint custody would mean fighting with Ellis, and if I'd wanted that, I would have stayed married."

Furthermore, Evelyn was worried, although [illegible] a child. He was 48 when Bobby, his only child, was born. She questioned his judgment.

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have rejected the idea on the spot, but the counselor made it clear that if she didn't cooperate she could lose custody altogether.

So despite the rough start, and with "excellent" counseling, Evelyn says she and Ellis established a goal: "Let's make things as easy as possible for Bobby."

Under the new custody arrangement, Ellis has Bobby every other weekend, plus three months in the summer. During summer vacation, Evelyn assumes the every other weekend privileges.

But that change is only a pale reflection of the radical difference in their lives.

"I'm a father again," Ellis says, smiling broadly. "Before, I was just someone who visited once in a while, and I could never say anything about Bobby. Now Evelyn recognizes me as an equal; she views me differently."

THROUGH THE COMMUNICATION and cooperation developed by sharing the rights and responsibilities of rearing Bobby, Evelyn says she and Ellis have become supportive friends. "We didn't communicate this well when we were married," she laughs. They freely phone to discuss Bobby's problems, "neither of us blaming the other," and, ironically, at times they find themselves a united front combating Bobby's attempts to manipulate them.

Moreover, the sharing has gone beyond the legal agreement. Evelyn recently started a new job that requires working evenings. To spare her babysitting fees, Ellis picks up Bobby after work every school day, prepares dinner and helps Bobby with his homework until his mother comes for him.

Says Evelyn, "This is the best decision for all three of us that we could have made."

Bobby, a shy, quiet third-grader, says he is happy that he sees more of his father and that the fighting has stopped. He recently expressed his feelings in an invitation he wrote at school:

Dear Mom,

Dad and you are getting good together. Mom, will you please invite my dad to my first communion. I want you to go together.

Love, Bobby

THE CONDITIONS under which the other family hammered out its joint custody arrangement were wretched.

In some respects the family is still reeling from the experience.

for divorce, she and her husband, Steve, and their two young sons continued to live under the same roof in an atmosphere acrid with condemnation and guilt, tongue-lashings and icy silences, fear and pain.

But Barbara, a state accountant clerk, was afraid to leave. She doubted that she could support herself and the boys on her $1,000-a-month salary, and she was worried about being charged with desertion.

And Steve wouldn't budge unless Barbara agreed to joint custody and his support proposal.

Barbara says she fought joint custody because she is a traditionalist who believed that children belong with their mother and because she couldn't be convinced that shuttling children back and forth week after week would be good for them.

Counseling, books and hours of soul-searching allayed some of her fears, but still she was concerned about dealing with her husband after so much gall had poisoned their relationship.

That problem didn't bother Steve. "It's a myth," he insists, "that you must be friends for joint custody to work. You just have to work out the rules on how you are going to conduct the business of co-parenting."

An active member of Equal Rights for Fathers and tireless worker for passage of the joint custody law, Steve successfully delayed court action on the divorce until the law went into effect.

FACED WITH the proposition of losing custody altogether or accepting joint custody, Barbara acquiesced.

Today she has a small apartment within minutes of the family home that Steve refinanced for himself and the children. He has the boys one week, she the next, an arrangement the four of them worked out together, and one that appears to satisfy everyone.

After five months of joint custody, Barbara admits it is working well. "The children have us equally in their lives. If you don't share in this much of your children's lives, you lose too much of their growing up."

Moreover, she contends that joint custody relieves children of guilt and helps them adjust to the breakup. "Of course the boys go through an adjustment every week," she say, "but they're super."

Another reason Barbara says she likes joint custody is that sharing the burdens and responsibilities of rearing the children leaves her time and energy to rebuild her life.

But the arrangement has kinks. Verbal recriminations continue to punctuate conversations, and the boys complains that their parents at times use them as messengers to avoid communicating.

they get tired of packing and unpacking their clothes — Michael and Jim say they like the arrangement "because we get to see them both the same."

And both boys express relief that the fighting is over.

ACCORDING TO McIsaac, "Anything we can do to diminish the fighting is good. It is like we (professionals) just recognized that divorce is happening and are for the first time giving support to the families as they reorganize. In the parental role, no divorce takes place. That must continue."

Some psychologists, attorneys and judges question the ability of parents to cooperate after divorce when they couldn't get along while married.

But Brinkley Long, director of Sacramento County Family Court Services, notes that "parents who try joint custody find there are levels on which they can communicate."

Critics claim that children need one full-time parent, not two part-timers.

McIsaac counters that with 38 percent of all marriages ending in divorce, 50 percent with children under the age of 12, we are creating a new family system — the bi-nuclear family. "The law is just beginning to catch up with reality," he said.

Although 13 states now have joint custody laws, California alone gives it preferred status. The legislation's sponsor, Assemblyman Charles Imbrecht of Ventura, says that the response to the change has been favorable, but he believes it is still too soon to judge the impact. "We'll look at it at least another year before deciding if it needs refinement," Imbrecht says.

5 A

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Testimony to be presented to the Assembly Judiciary Committee at the interim hearings of October 14, 1981 in San Diego, California.

Having recently completed a study of joint-custody and visitation fathers, I wish to present to the Committee for its consideration several results which not only support but also expand upon past research, and which bear directly upon the issues to be addressed at these hearings.

It has been claimed that the joint-custody status is of benefit to the father, not to the child; that joint custody is a father's issue, not a child's issue.

Among the most important findings of my study of forty-six divorced fathers, twenty-four of whom were joint-custody fathers, was that the joint-custody status offers fathers the impetus to be more involved in their children's lives and to remain active participants in their children's upbringing. While visitation fathers reported fewer visits at present than immediately after separation/divorce, joint-custody fathers, as a group, reported the same or more visits. Further, joint-custody

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fathers perceived themselves as having greater knowledge of and more influence on their children than did visitation fathers.

Most important, however, was the finding that the perception of some degree of shared physical custody was positively related to the degree of involvement with the child. That is, the perception that the child lived in his home as well as that of his ex-wife contributed to a father's increased involvement with his child and to his continued presence in his child's life.

In view of the fact that we have learned from past research that a visitation father removes himself from his child's life and sees his child with less and less frequency after divorce (Heatherington, Cox & Cox, 1978), and that children of divorce are left with feelings of abandonment and experience serious depression at the loss of their fathers even years after the divorce (Wallerstein & Kelly, 1980), it would seem essential to give serious consideration to any alternative custody arrangement which would facilitate on-going paternal involvement. Creating a climate which would allow a father to continue to contribute to his child's development and to remain present in his child's life after divorce would not merely benefit the father, but the child as well.

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The Effect of Divorce on Fathers: An Overview of the Literature

BY JOHN W. JACOBS, M.D.

Divorce is becoming a major mental health problem in the United States. With rare exception psychological attention has usually focused on the effect of divorce on children and mothers. The author suggests that as some fathers become more involved in family nurturing they will be more intensely affected by marital disruption, particularly as it involves changes in the relationship to their children. A review of the recent psychological literature on divorce and custody is presented as a framework for understanding the divorcing father who is requesting psychiatric help. (Am J Psychiatry 139:1235–1241, 1982)

Divorce is now endemic in American life. The divorce rate has soared from 2.2 to 5.3 per 1,000 population in the past 2 decades. In 1978 more than 1.1 million divorces involving 3.5 million men, women, and children were granted by American courts (1).

As both the absolute number and the rate of divorce have accelerated, there has been an increased interest in the emotional problems leading to and resulting from marital separation and a dramatic increase in the number of psychological articles written about divorce and its sequelae. For the most part, these articles are concerned with the difficulties encountered by the children of divorced parents and their custodial mothers (2–13). Rarely, with important exceptions (14–18), do they focus much attention on the problems of fathers who are divorced or who are experiencing marital separation. Because many American fathers have adopted a more involved parental role within the intact family (19), they are likely to experience increased emotional hardship around the time of marital separation and to seek psychiatric help during this time of distress. This paper presents a review of the relevant literature written on those aspects of divorce that ultimately affect the functioning of the father before, during, or after divorce.

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EFFECT OF DIVORCE ON CHILDREN

The presenting complaint for many fathers who come for treatment in the midst of a divorce crisis seems to be the threat of losing their relationship with their children. Before the 1900s the father would almost always be granted custody of his child (20). Since then, it is usually the mother who becomes the child's custodian. Today fathers frequently perceive divorce as requiring a dramatic diminishment or total severance of their relationship to their children. In the past 10 years a substantial amount of literature has accumulated which suggests that this specific aspect of divorce may be responsible for many of the severe psychiatric sequelae experienced by all family members following marital disruption.

Wallerstein and Kelly (5, 6, 8, 9, 11) studied 60 divorcing families and paid special attention to the effects of divorce on children of different age groups. They summarized their findings and therapeutic interventions by saying that they made many suggestions to support a continuing relationship between the children of divorced families and their fathers. They repeatedly observed the suffering and intense longing that these children experienced toward the departed parent and found that enhanced ease of access to the visiting parent led consistently to a lessening of the child's distress (21).

McDermott (22, 23), Woodruff and associates (24), Morrison (25), Lang and associates (26), Tooley (27), and Kalter and Rembar (28, 29) have all reported on the various symptoms of children from divorced homes seen in *psychiatric settings*. Although there is some disagreement among these authors as to which age group tends to show which symptoms, a consensus exists that poor self-esteem, depression, aggression, poor school performance, and antisocial actions are very frequently found in this population of children. All the authors noted that these families contained a distant, uninvolved, unsupportive, or angry noncustodial father and/or a chronically embittered, angry, vengeful custodial mother.

Unfortunately, all studies of the effect of divorce on children suffer from the same methodological limitation. None of them is able to isolate divorce as the sole variable in the child's disorder. To properly identify the role of divorce in the production of childhood emotional problems, a large prospective study is required. Such a study needs to examine children with varying degrees of emotional difficulty living in intact

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families characterized by varying forms of family pathology. These cohorts should then be followed to see if those children of parents who ultimately divorce fare any worse than similar children from similar parents who elect to stay married. It should be no surprise to anyone that children from divorced homes have emotional difficulties; this is no more surprising than the finding that children from unhappy marriages tend to have emotional problems. Both are part of today's psychological truisms, and neither statement isolates the etiological significance of divorce itself. It is possible that children from unhappy families do better following divorce than they would have done otherwise, and it is further possible that children born with a predisposition to emotional difficulty in some way contribute to family strain and parental divorce. It may well be that when a longitudinal, properly controlled study is ultimately done the findings will echo Despert's observations (3), published in 1953, that it is not divorce which determines a child's adjustment but the nature of the parental interactions before and after, with or without divorce.

In a summary of the psychological literature Shinn (30) reviewed 54 papers on the relationship between "father absence" and children's cognitive development. The evidence strongly suggests that absence of the father, or a low degree of paternal emotional support of the child, is directly correlated with poor performance on cognitive tests. Lambert and Hart (19) found that children whose fathers were involved with teachers at school conferences were 7 months ahead on reading and mathematics scores when compared with children whose fathers were not involved in this manner. Radin (31, 32) also found that in young boys paternal nurturance is significantly and highly correlated with increased IQ. Pedersen (33) has drawn attention to the multiple ways in which the father's presence can affect a family, either by directly influencing the child or by indirectly influencing the mother's behavior and interactions with the child. Herzog and Sudia (34) have published an excellent review of the methodological errors most frequently encountered in the studies of fatherless families. They too pointed out that the absence of the father may affect a child in many different ways, but they stressed that the impact on the child of growing up in such a home will be most affected by conditions that existed in the marriage before the parental separation.

EFFECT OF DIVORCE ON FATHERS

In the last few years a number of studies have begun to examine the effects of divorce on fathers. Divorced men are particularly vulnerable to psychiatric illness. Bloom (35) found that men from broken marriages were nine times more likely to be admitted to psychiatric hospitals for the first time than men from intact homes. For divorced women there is a threefold increase. His data further indicate that admission rates were higher for separated men than for legally divorced men, suggesting that the period around the time of separation is particularly critical and that the crisis ebbs as the divorce process unfolds and ultimately becomes a legal fact.

Other studies on the stress of divorce and separation have been summarized by Bloom and associates (36). Automobile accidents double in frequency from 6 months before to 6 months after divorce. Divorced and separated people are also overrepresented in surveys of successful suicides, homicides, and deaths due to a variety of medical illnesses, including lung cancer, diabetes mellitus, and arteriosclerotic heart disease. The greatest risk for stress-related morbidity seems to exist about the time of marital separation.

The various emotional and behavioral responses of fathers to the stress of divorce have been studied by Hetherington and associates (14), Keshet and Rosenthal (15), Greif (16), and Wallerstein and Kelly (18). Hetherington compared 48 divorced fathers whose ex-wives had custody of their children with a series of matched married controls. The divorced men were studied for 2 years after their legal divorces. Hetherington's data do not include observations of paternal reactions during the early phases of marital separation—the very time when fathers may experience the most distress. Further, she does not indicate how much time had elapsed between separation and legal divorce. (These data would be helpful in trying to develop a treatment strategy.) Nonetheless, she found that 2 months after divorce, the fathers were spending more time at work, in household and solitary activities, or with friends. They had a great need to avoid solitude and inactivity. Many men began to lose contacts with old friends, and dating and casual sexual encounters were more frequent throughout the first year. Two years after the divorce these men complained of feeling shut out, rootless, and at loose ends. Most of the fathers yearned for intimate, loving, stable heterosexual relationships, which they considered paramount for their own happiness and self-esteem.

Initially most of these divorced fathers did not get along well with their ex-wives. All but 4 of the 48 couples had relationships characterized by acrimony, anger, feelings of desertion, resentment, and memories of painful conflicts. By the end of 2 years, however, both conflict and attachment between the ex-spouses had substantially decreased. Although about one-third of the fathers reported an excited sense of freedom immediately following divorce, this feeling alternated with—and by 1 year had been replaced by—depression, anxiety, or apathy. By the end of the 2-year follow-up all these affects had markedly decreased.

Of all the potential adjustments, the most compelling problem for these fathers was their [illegible]

use of loss of their children. Of the 48 fathers who had been highly involved, affectionate parents while married, 8 reported that they could not tolerate the pain of seeing their children only intermittently. Two years after the divorce these fathers had diminished the frequency of their visits with their children in an attempt to lessen their own unhappiness. Nonetheless, they continued to experience a great sense of loss and depression. Even those men who had remarried spoke of intense feelings of loneliness. Finally, as in the other studies cited above, Hetherington and associates (14) reported that low conflict between parents and more frequent paternal contacts with the child were associated with better mother-child interactions and with a more positive postdivorce adjustment of the child.

Wachel and Rosenthal (15) studied 128 divorced fathers, of whom 10 were studied in depth. The 10 divorced fathers were from the upper middle class. They had been divorced for at least 2 years and regularly saw their children (7 years of age or younger) for no less than 2 days a week. The initial reactions to divorce for these men were similar to those found in Hetherington's sample. The major difference between the groups was that these fathers were able to create their own households and set up schedules for prolonged, frequent contact with their children. As they did so, their feelings of inadequacy, anxiety, and depression were gradually replaced by a sense of confidence and accomplishment.

These authors (15) concluded that fathers who are able to recognize their dependence on their children's love (as well as the children's need for ongoing paternal care and attention) and who can respond to their children during a time of crisis and deprivation will find that the parental relationship is the definitive referent for restructuring their postdivorce life style, behavior, and self-concept.

Greif (16) studied 40 middle-class divorced fathers who differed widely in the amount of regular contact they were allowed to have with their children. Twenty-three of the men developed physical symptoms following marital separation that included weight loss, ophthalmological and dental problems, hypertension, rheumatoid arthritis, and headaches. The fathers who experienced "child absence" manifested signs of depression, including depressed mood and difficulty in sleeping, eating, working, and socializing. Although depressive illness before the divorce could not be ruled out (Briscoe and associates [37–39] have found affective illness to be a predisposition to divorce), these men felt overwhelmed by feelings of loss of their children and their sense of devaluation as parents. As in Hetherington's study, many of these men dealt with their pain by distancing themselves even further from their children.

Greif's data suggest that just as children who regularly see their fathers have the best postdivorce adjustment, fathers who spend the most time with their children tend to be less depressed and most satisfied following marital separation. Of the 40 fathers in her study 8 had joint custody, saw their children regularly, and were involved in making decisions about rearing their children. These were the men who did the best in spite of the fact that often they continued to have recurrent conflicts with their ex-wives.

Wallerstein and Kelly (18) reported on the postdivorce father-child relationship in their sample of 60 divorced families. They found that a knowledge of the predivorce relationship could not be used to predict postdivorce outcome. Similar to Hetherington's and Grief's findings, Wallerstein and Kelly found that men who had had close relationships with their children could often not cope with the repeated pain of separation induced by the visiting-parent process. Other fathers who had limited contact with their children before divorce became more involved parents after divorce. The authors reiterated their findings that strengthening the relationship with the father was the single most important focus for preventive intervention with the child. They found this to be especially critical for the adjustment and development of the younger children in their sample.

CUSTODY AND VISITATION

Since the life of the divorcing father so often involves the father's relationship to his children, awareness of the various structures of child custody, visitation awards, and agreements are of paramount importance. All mental health literature on this subject is written from the perspective of what is best for the child. In spite of this singularity of purpose, mental health professionals remain staunchly—and at times vociferously—divided on this matter in both theory and practice. Needless to say, the psychiatric literature rarely concerns itself with what is best for the father, nor does it link the father's well-being with the ultimate well-being of his children. It should be noted that in the articles on child custody discussed below there is no report of a systematic longitudinal psychological study of any circumscribed population of children from divorced families that uses acceptable scientific methodology, i.e., blind observers or adequate control groups. Most of the work remains impressionistic and highly skewed by value judgments. Clearly, much further work needs to be done on assessing the impact of different forms of custody on both children and parents.

Goldstein and associates (40) put forth the idea, based on their theoretical (psychoanalytic) position, that all children of divorce should be in the custody of the one parent who can provide the greatest continuity of care. That parent should then have total control over the amount that the other

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position is advocated for all children of every age and either sex without regard for the negative effects of having the noncustodial parent-child relationship subject to the whims of the sole custodian.

Roman and Haddad (41) criticized Goldstein and associates and suggested in opposition that joint custody should be considered in the best interest of the child as well as the parents. By joint custody they mean that both parents equally share in the making of significant child-rearing decisions and mutually share in regular child care responsibilities. However, Roman and Haddad have not in any detail suggested how to effect such cooperation between ex-spouses, who often hate each other, nor have they suggested how to realistically share custody if the parents do not live in the same community.

Abarbanel (42), in studying joint custody arrangements, reported that for most children there is little discontinuity and no evidence of developmental pathology in having two regular homes instead of one. Like Roman and Haddad, she strongly suggested the consideration of joint custody. Similarly, Steinman (43) found that having a regular relationship with both parents enhanced the child's self-esteem. Nonetheless, one-third of her sample of 32 children under joint custody felt burdened by the requirement of maintaining a strong presence in two homes. Benedek and Benedek (44) also differed with Goldstein and associates, believing it the child's right to see the noncustodial parent regularly. They also critically reviewed the theoretical merits and problems associated with joint versus sole custodial arrangements (45). Gardner (12) has taken a flexible approach to this issue. Recently Ilfeld and associates (46) published one of the first controlled studies comparing the effects of joint custody and sole custody on the frequency of relitigation. Their initial study did not contain psychological data on the involved children, nor did it compare them by age or sex. Nonetheless, they reported that joint custody diminished the need for further court appearances.

Even the matter of the involvement of mental health professionals in child custody proceedings is in controversy. Many, like Westman (47), Benedek (48), and McDermott and associates (49), have called for the liberalization of laws and the increased involvement of trained mental health professionals in custody decisions. Derdeyn (50) and Gardner (51) decried the involvement of mental health professionals in an adversarial position. Benedek and Benedek (52) strongly disagreed with this view and urged mental health experts to take an active part in working with attorneys to influence custodial decisions. Bernstein (53) sees the lawyer and mental health counselor as an interdisciplinary team. The literature provides little unanimity of opinion in suggesting what role the mental health field should take regarding child custody and parental visitations.

FATHERHOOD

Recently, as more fathers have gained sole custody (in most states, however, fathers still win sole custody in fewer than 5% of contested divorces), there has been renewed interest in the process of single-parent fathering. It used to be assumed that grave psychological consequences would develop for children reared in such a family structure. Recent articles by Gasser and Taylor (54), Mendes (55), and Orthner and associates (56) have suggested that this is not the case.

In the psychoanalytical and psychological literature, there has been a steadily growing recognition of the importance of fathers for the normal development of children. Lamb (57) excellently reviewed the current psychological literature on the role of the father in child development. He identified the serious methodological errors made by studies which assume that fathers play a minimal role in child rearing and succinctly summarized the current literature which presents mounting evidence of the developmentally critical nature of nurturant father-child interactions. Abelin (58), following the work of Margaret Mahler in directly observing young children, reported on the vital role the father plays in helping the child separate from its earliest attachments to the mother. Abelin's observations (59) led him to state that for many children "the father relationship seems to develop side by side with the mother relationship from earliest weeks on, and to share many of its 'symbiotic' qualities."

Conversely, for the last 3 decades there has been a growing recognition of the importance of parenthood as a developmental phase for adults. As early as 1958, Benedek (60) called attention to the roots of paternal identity and the importance of such development for fathers and children alike. She recognized that parenthood remolded and matured a man's psychic organization. Ross (61), in a review of the psychoanalytic literature, contended that nurturance in men originates in early, developmentally normal identifications with the good nurturing mother that are later superseded and are at times defended against by identification with a more or less nurturing father.

In summary, a review of the literature of the last 15 years suggests a number of conclusions. Fathers play an extremely important role in the development of their children. Children deprived of their fathers due to parental divorce may suffer seriously from a wide range of psychopathology. Divorced fathers likewise often suffer from the loss of their children and, like their children, do better [illegible] there is greater continuity of contact.

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APPROACH TO TREATMENT

With rare exception (62, 17) the literature on the treatment of problems associated with divorce has

been written from the perspective of the whole family. There is general agreement among these authors that although divorce creates a new family structure, there is still a reorganized family that must function for years to come. The focus of this literature has been on helping couples separate with the least possible further emotional damage. Specific attention has been paid to minimizing the trauma done to children by lengthy legal battles and by protracted hostility between the parents.

Fisher (63), Haynes (64), and Suarez and associates (65) outlined a viable strategy for divorce mediation in consultation with attorneys. In a series of informative articles Kressel and associates (66, 67) reviewed the technical problems encountered in conducting divorce therapy. They emphasized the role of countertransference and the nature of the couple's emotional bond to each other. Coogler (68–70) has extensively reported on the successful development of court-related divorce mediation and family conciliation units. Central to this conciliation process is the strong direct stance the mediator takes against the couple's use of fault finding, recriminations, rage, or blame. A basic assumption of such mediation is that dissolution of a marriage necessitates a rearrangement or restructure of family life so that both parents can have a meaningful relationship with their children (71).

Whitaker and Miller (72) challenged this form of intervention, arguing that no therapist should see a couple for the expressed purpose of facilitating a divorce lest they unwittingly help destroy a potentially vital marriage. They feel certain that if only one member of a divorcing couple is seen in therapy, this too will potentiate divorce or prevent reconciliation.

Although one would do well to keep these points in mind, lest the possibility of reconciliation be missed, it is clear that millions of American couples are divorcing and psychiatrists are being called on to reduce the trauma experienced during marital separation. Most of the literature on family therapy argues that the earlier and more effectively the therapist enters the process, the greater will be the chance of forestalling prolonged and severe conflict.

Leader (73), Sheffner and Suarez (74), Goldman and Coane (75), and Weisfeld and Laser (76) have all recommended the inclusion of the father for successful family treatment of divorce-related pathology during the postdivorce period. Thus, within the family therapy literature, there is an awareness of the problems associated with divorce and the development of treatment strategies that directly address and involve the father.

Recently, Friedman (17) reported on his treatment of two fathers who underwent divorce during their analytically oriented psychotherapy. He reported that the maintenance of their relationship to their children was a positive developmental experience for both the children and the fathers. My own clinical experience with fathers coming for treatment in the midst of the divorce process suggests that although there are numerous and complex forces in each individual patient, the primary salutary focus of crisis work has been the supportive maintenance (sometimes against great external odds) of the father-child relationship. My experience also parallels Wallerstein and Kelly's observation (18). This crisis is most severe for the fathers of younger children.

To this point, though, the weight of the psychiatric literature has strongly supported the view that treatment of the entire divorcing family unit should be regarded as the central therapeutic modality when divorce or divorce-related problems are major issues for a patient. Treatment of the father alone seems best considered when couple therapy is no longer possible.

DISCUSSION

Much work still needs to be done to elucidate the experience of fathers when they undergo divorce. Interest in the life of the divorcing father seems particularly critical at a time when increasingly large numbers of involved parents are living through the stress of divorce and attempting to adjust to new forms of family life and child care arrangements.

It should be no surprise that the divorcing father is the family member least considered in the psychiatric literature on divorce. To some extent this trend parallels what until recently seemed to be the short shrift generally given to fathers. This tendency is fostered by the typical father's unavailability for easy study by mental health researchers (few researchers have spent as much time at night and on weekends with fathers and their children as they have during the day with mothers and the same children) as well as by the literature's ever-expanding focus on the child's earliest developmental phases.

Such theoretical, methodological, and practical problems confronting mental health professionals reinforce the still prevailing archaic stereotypical view of fathers as generally being removed and uninterested in child rearing both during marriage and after divorce. Although this view of the uninterested father is undoubtedly true for some men (and, of course, for some women too), the recent studies noted above make it clear that for many fathers this is not the case. For them marital separation, in large part, creates a child-centered crisis in which the threat of losing or curtailing the relationship with their children is the source of severe anxiety. It all too frequently results in panic or depressive states.

There appears to be an increasing confluence of thought within the literature suggesting that those fathers who maintain regular prolonged contact with their children do best in the postdivorce period. This is paralleled by evidence that the children of such fathers

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tend to make the best postdivorce adjustment. There is also mounting clinical evidence that treatment of the father which focuses on helping him maintain his relationship to his children will have the most salutary effect on all members of the family. This may be so even in those situations where mothers are initially opposed to the continuance of the father-child relationship.

A review of the current literature thus has broad implications for mental health professionals who treat divorcing fathers. The strong consensus that central to the father's recovery is the maintenance of his paternal role behooves the therapist to identify and help resolve intrapsychic and interpersonal conflicts which interfere with such an end. In a forthcoming paper I will discuss these conflicts and their technical management in greater detail.

Crisis work with divorcing fathers is not a substitute for more explorative therapy that can evolve, if required, after the crisis has ebbed. A review of the current psychiatric literature strongly suggests that such work is best done by professionals who are 1) comfortable being engaged in active crisis intervention; 2) aware of the social, political, and legal issues facing divorcing fathers; 3) able to move flexibly between treatment of the individual, the couple, and the whole family; and 4) aware of the value to the entire family system of having both parents as actively engaged as possible with their children.

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BY BENJAMIN SPOCK, M.D.

JOINT CUSTODY AND THE FATHER'S ROLE

In the United States, one third of all marriages now end in divorce. This concerns me. What concerns me even more is that with this rise in the divorce rate, 1 million more children each year are confronted with the breakup of their families and there are already 6 million single-parent families with minor children.

Though in the long run divorce may be the best solution for an unhappy marriage, close observers agree that with single-parent custody awarded to the mother in 90 per cent of the cases, there is misery for all concerned—children, fathers *and* mothers—at least for a couple of years.

This article, then, is about the relatively new and still-rare practice of awarding custody of children jointly to both parents. It is also a review of a book, *The Disposable Parent*, by Mel Roman and William Haddad, that advocates joint custody.

Roman is a family therapist and professor at Albert Einstein College of Medicine in New York. Haddad, a divorced father of three, is a journalist and business executive.

It was surprising to me to learn from the book that prior to the 20th century, custody customarily was awarded to fathers. Yet the laws of nearly all states, then and now, declare that there shall be no prejudice in favor of mother or father in granting custody, that the determining factor should be the "best interests of the child." In other words, the strong bias of judges, first toward fathers and later toward mothers, has been based on psychological and sociological influences, not on the law.

The description by the authors (and by other observers they cite) of the strains imposed on children and their parents by single-custody rulings corresponds with the picture presented by psychiatric social workers Ruth Atkin and Estelle Rubin in their book *Part-Time Father*, which I reviewed a couple of years ago. It also corresponds with my observations in the course of my professional life. So what follows is a composite description.

Children, at least prior to adolescence, almost universally implore their parents not to divorce, and afterward keep pleading with them to get together again. They show, in a wide variety of symptoms as well as in words, that they badly miss the parent who has moved out.

In their book, Roman and Haddad refer to the "California Study," headed by social worker Judith Wallerstein and psychologist Joan Kelly. (Redbook reported on this study in September, 1976, and published a Young Father's Story dealing with joint custody in June, 1978.) The California Study involved 60 families with 131 children among them, all of whom were studied immediately after and a year after divorce. (The findings shouldn't be considered necessarily true of all children of divorce, since the numbers in each age group were small.) Children two to four years old showed considerable regression right after the divorce in toilet training, whining, crying, irritability, tantrums, sleep problems and aggression. In their fantasies they expressed fear of abandonment. The distress of half of these children was worse after a year, particularly if the parents were still locked in conflict.

The five- and six-year-olds showed anxiety and aggressiveness. A year later a third of them were showing even greater strain. Relations with their fathers usually were improved, but relations with mothers often were worse.

The seven- and eight-year-olds showed the most sorrow and seemed to have the fewest ways of dealing with it; they did not reject one parent but wanted to hold on to both. They expressed longing for more time with their fathers. After a year, half had improved.

The nine- and ten-year-olds seemed to understand the realities and had fewer irrational fears, but they had physical aches and pains. Under the surface they showed feelings of loss and rejection. They tended to feel anger at one parent, and to end up siding with their mothers against their fathers, who had left. After a year half of these children felt better, though their hostility toward their fathers lingered. The other half were more troubled and depressed than they had been before.

Divorce was very painful to adolescent children too, but after a year they no longer felt they had to take sides and could proceed with their own affairs.

At all ages, "the frequency of father contact with the child was associated with more positive mother-child interactions, and with, in general, a more positive adjustment of the child." The effectiveness of the mother with the child depended on various supportive relationships, but "none was as salient as a positive, mutually supportive relationship of the divorced couple and continued involvement of the father with the child."

Roman and Haddad also discuss what they call the "Virginia Study." This study was directed by psychologists E. Mavis Hetherington, Martha Cox and Roger Cox; it involved 48 divorced families, with 48 intact families for comparison. It focused on parents, children and on parent-child relations. Among its conclusions: Young children of divorce tended to be more aggressive, to whine, weep and have tantrums. Parents had more trouble controlling them. The tension was greatest between mothers and sons. The fathers' departure was more traumatic for children of preschool age. Girls took it easier at this age than boys. But for adolescent girls the fathers' departure seemed more harmful in the sense that they had difficulty establishing good relationships with boys.

The Virginia Study, too, showed that the problems between parents and children were still tough a year after divorce, but that they had improved after two years. As in the California Study, "the children who fared best were those who were free to maintain full and loving relationships with father as well as mother."

A recent Research Conference on Consequences of Divorce on Children, at the National Institute of Mental Health in Bethesda, Maryland, came to the same conclusion: Continuous meaningful contact with the noncustodial parent was a crucial factor in the child's post-divorce adjustment.

The noncustodial father is, to a large extent, divorced from his children as well as from his wife. In many cases he is permitted to see his children only one or two days a week and, in many cases, every other weekend. He may not be allowed to keep them overnight. Some-

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times he may merely visit them in the mother's home, not take them out.

The interviews with fathers in the Virginia Study made vivid how miserable they themselves were; they felt rejected, depressed and homeless. Some reported that they'd even lost some of their sense of identity. They emphasized how painful it was to visit with their children because of the infrequency of those visits, and the resulting sense of a growing distance between themselves and their children.

Divorced fathers are depressed, I know, because their children tend no longer to turn to them with questions, requests and confidences. They feel keenly the deprivation of their former right and obligation to share in the usual parental decisions affecting their children—allowances, duties, privileges.

Some fathers complain that they are being deliberately humiliated by their ex-wives, who, they feel, take a mean satisfaction in being arbitrary and overbearing in respect to the conditions they lay down for visiting. Often they forbid visits unless alimony is paid up.

As for the mothers, the Virginia Study shows that most are unhappy for at least the first two years after divorce. They feel anxious and angry and helpless. Some complain of feeling unattractive. Two thirds of them have to go out to work (compared to half of nondivorced mothers); and still they have to deal with a reduction in their standard of living. (It is calculated that it costs 25 per cent more for the same number of people to maintain two residences.)

On coming home from the job they have the housework to do, without the help or companionship of another adult. The children's needs, demands, disputes and difficult behavior have to be coped with. And in most cases the children are distinctly less co-operative and more antagonistic than previously.

Most divorced mothers find their social life painfully restricted—by their jobs, by the need to be with their children, by the fact that their old friends are couples who think of entertaining in terms of inviting other couples, not single people, and by the meager opportunities, usually, to make new social contacts.

As Roman and Haddad say, divorced mothers are overburdened and fathers are underburdened.

To summarize at this point: The father's continued closeness to his children is of primary importance to the youngsters and to their adjustment. His cooperativeness with his ex-wife has been shown to be important to her sense of adequacy in dealing with the children and to her good relationship with them. Nevertheless most divorce judgments limit sharply the father's contact with his ex-wife and children. This makes him feel unneeded, unwanted and uncomfortable, and may cause him to decrease his visiting as the months and years go by. It's a tragic vicious circle.

PROBLEMS FOR THE INDIVIDUAL PARENT IN SOLE CUSTODY SITUATIONS

1. Loss of familiar activities and habit systems
2. Loss and separation anxiety.
3. Role loss, particularly among non-custodial parents.
4. Decline in ability to parent.
5. Physical symptoms related to separation and loss of parental role.
6. Practical problems, such as economic instability.
7. Lowered self-concept.
   Fathers: Greater initial changes, rootlessness.
   Mothers: Feeling physically unattractive.
8. Declining feelings of competence.
9. Loneliness.

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Continued from page 79

Roman and Haddad are pessimistic about how soon joint custody will be widely accepted. Most judges are strongly biased in favor of mother custody. Lawyers habitually encourage divorcing couples to take adversary positions. And the whole of society, despite the progress made by the Women's Movement, is still saturated with sexist prejudices, so that even independent-minded mothers are apt to feel slightly guilty to ask for less than full custody and fathers are inhibited about admitting that child care should be as important as their jobs.

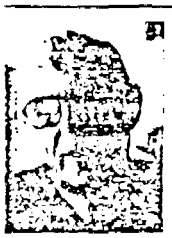
The authors emphasize the great importance of expert counseling and mediation services to parents before, during and after divorce, and state that such help should be free or with fees based on a sliding scale, depending on the family's income.

As for my own opinion, I've always felt and written that it's vitally important for the divorced father to see his children often and without missing appointments, this for the benefit of the children and to maintain his sense of closeness and responsibility. He ought to see them in his home, where they should have beds and some of their toys, books and clothes so that time can be spent in a "home" atmosphere and the father doesn't have to be always taking them on excursions and giving them treats. I've stressed that it is crucial for the mother to treat and speak of her ex-husband with respect for the benefit of the children, even if she despises him in some ways, since the children consider themselves half made of him and will think less well of themselves if they are persuaded that he's a scoundrel.

I had always assumed the law specified that children were to be awarded to their mother unless she was patently unfit. Now that I know better, I'm strongly in favor of joint custody for all parents who think they can summon the co-operation required. It will allow children to feel that they still have their father, because they will continue to live with him much of the time and because they know that he is still helping to make the decisions. The father will continue to feel close to his children, that he is participating in their lives and is still partly responsible for their welfare. And though joint custody may confront the mother with frustrating compromises about the children's lives, it should compensate her in most cases by giving her free time and relief from the uneasiness of feeling responsible for all problems and all decisions.

I can see in theory the objections some professionals raise to children living split lives in two homes. But certainly by now we have evidence, not only from cases of joint custody but also from all the families in which both parents work and pre-school children spend all day in a day-care center or in the home of a care-giver, that children can make a good adjustment to two homes when the plans are made with care and with sensitivity to their needs.

I agree about the value of having the children live with the father half of, at least a third of the time. But when this is not possible—for example, when the father feels he must live in another city—it would still be an advantage to the children and the father and other [illegible] mother, to have joint custody anyway, with the children spending some vacations with him, if possible. In this way the children will not feel they are cut off from their father, and the father will retain his sense of relationship to his children as well as his sense of responsibility for them.



Benjamin Spock M.D., is a contributing editor of Redbook and writes a regular column for the magazine. His well-known book "Baby and Child Care" was published in 1[illegible] was revised in 1957, 1968, 1974 and again in 1976. It has sold over 23 million copies, has been translated into [illegible] languages and is probably [illegible] and has [illegible] He and his wife [illegible] Massachusetts. [illegible]

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marriage and divorce today

The Professional Newsletter for Family Therapy Practitioners

Volume 9, Number 51 | An Atcom Editorial Staff Publication | July 23, 1984

8)

JOINT CUSTODY BEST ALTERNATIVE WHEN EX-SPOUSES ARE HOSTILE: NEW RESEARCH

Joint custody is typically viewed as a viable post-divorce option only when former spouses can be cooperative parents. Now a new study reveals that joint custody is the best option when there is a hostile and antagonistic post-divorce relationship between former spouses. That is the conclusion reached by *MDT* subscriber Dr. Sue Klavins Simring, D.S.W., based upon her research with 44 divorced and/or remarried fathers with legal joint custody. (See sidebar for more details on study organization.)

Many of the fathers told Simring that they believed that without joint custody, they would have been shut out of any parenting responsibilities for their children. Hostility from ex-wives -- one-third of those interviewed used this term to describe their post-divorce relationship -- would have led to attempts to sabotage relationships with their children.

In contrast with other studies of father's post-divorce parenting relationships, which report on the "disappearance" of a large percentage of fathers, these 44 fathers maintained active and involved relationships with their children. And this positive relationship continued even when a father remarried. The fathers reported that they were satisfied with the time they spent with their children. They felt influential in their children's growth and development.

STUDY ORGANIZATION

Simring bases her conclusions on research exploring the fathering experiences of 44 divorced and remarried fathers with legal joint custody. All of the fathers had at least one child under the age of 16. The fathers filled out a questionnaire and were interviewed about the frequency of their participation in various child care activities, and their perceived influence on their child's growth and development. Three fathering measures were derived from the questionnaire. The father's perception of the relationship with the mother (coparenting relationship) was correlated with the fathering measures to determine if the amount of interaction between coparents and the amount of support or conflict in their relationship was associated with high or low scores on the fathering measures.

During the course of her research, Simring found that previous involvement in caretaking for one's child was no indication of post-divorce conditions. Many of these 44 fathers had previously maintained very traditional roles; none had ever been the primary administrator in their home. However, all were able to create a satisfactory home for their children after the divorce. "Their amount of involvement or influence with their children was truly impressive." This involvement is extremely important. Previous research has linked a father's post-divorce involvement with his children with their physical and psychological well-being.

"Joint custody fathers in nonsupportive relationships with their former wives were not undermined in their ability to be with their children, as fathers without custody have traditionally been. Their equal power in joint custody did not give the mother a legal advantage, and thereby prevented her from using that power to control the father's access to the child. The security of the father's legal position allowed him to function as a father somewhat independently of how good the co-parental relationship was. Almost unanimously, fathers advocated joint custody as a means of securing equal legal rights and responsibility for their child, and as a guarantee that they would not be dispossessed from their child's life. Although most of the fathers desired that their children live with them at least half the time, when this was not possible, their legal status contributed to the father's confidence in his position, influence, and freedom from the fear of being displaced, helped them sustain their commitment to their child."

Contact: Dr. Sue Klavins Simring, D.S.W., Family Solutions Center for Divorce and Custody Consultation, 103 Eagle St., Englewood, NJ 07631, 1-201-569-7666

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 4/Dec 84
BILL NO. SB 15-2115

A kit of our materials (Mismatch, Wage Assignment booklet of 23 amendment proposals, and testimony for the Senate Finance Committee) was delivered to the Washington Post Co, which publishes Newsweek, on the morning of Tuesday, Jan 24th.
- James A. Cook

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NEWSWEEK/FEBRUARY 6, 1984

All Dads Aren't Deadbeats

MY TURN/BERNARD GOLDBERG

The calendar measures a certain kind of time and only imprecisely. For one unhappy American minority, 1984 came a long time ago.

The minority is divorced fathers with children. And for them, the American judicial system is an Orwellian nightmare intent on proving that "Mother knows best" and that being a father doesn't necessarily mean having children.

The system has made fathers visitors in their children's lives: visitors who can pick their sons and daughters up for a few hours every now and then—so long as it doesn't interfere too much with Mom's new life. And it has turned divorced fathers into bankers. Absentee bankers.

And now, another slap. Another piece of official abuse. A number of politicians in Washington have suddenly discovered the doctrine called "the best interest of the child" and they plan to implement it with a federal law that would garnishee the wages of divorced fathers who don't pay their child support on time.

Most of us who do pay on time each and every month and who love our children would applaud the legislation. No one I know defends deadbeat fathers who don't care about their kids or even if they're fed and clothed properly.

But what is so infuriating is that the Washington politicians who speak so passionately about the child's best interest never seemed to care about it before. What "best interest of the child" is served when courts routinely allow mothers to pick up and move hundreds or even thousands of miles away, leaving fathers desperate, trying to figure out how to raise money and get time off from work to see their kids more than once or twice a year?

Custody: What "best interest of the child" has been served by a system that, until recently, virtually always gave custody of children to mothers? As Doris Freed, a lawyer and nationally recognized expert on divorce law and custody, has said: "You would almost have to prove that she was in bed with her lover and that the children had to serve them beer in bed. It has been sex discrimination against men in the most blatant way."

Nan Shapiro of the Organization for the Enforcement of Child Support recently stated, "The reason that over 90 percent of children living in single-parent homes are living with their mothers is that most fathers do not *want* primary custody." That kind of thinking may make a lot of divorced mothers feel righteous and comfortable but could it be that many men see the system so stacked against them that they don't even try? Could it be that many men can't afford the financial costs of a legal battle for custody? Could it be that many men care too much for their children to put them through a custody fight? Because many divorced fathers see this as sex discrimination, one might also ask if few women went to medical, law or business school over the years because women did not "want" to become doctors, lawyers and businesswomen or because an institutionally biased society thought "girls don't do those things"?

Best Interest: What is so irritating about the current debate is that politicians who never said anything about how the system worked against fathers and didn't look out for "the best interest of the child," either, are now so concerned. My guess is that it isn't the child's best interest that is suddenly so important to them but their own best interest. It is 1984, after all, and that means elections. And that means "the women's vote," which in this day and age a politician ignores at his or her own peril.

A lot of men, if the statistics we read are correct, do, in fact, welsh on their kids. But a lot of divorced mothers welsh, too. A lot of them, as the custodial parent, deny visitation rights, leave town for parts unknown come Father's Day, subtle things like that.

> Let's have one law that would ensure fair child-support payments and fair visitation rights.

It shouldn't be difficult to understand how an otherwise decent man might be overcome by pain and frustration. The system might convince him that he is, after all, a father without children and at some point he just might give up. And stop paying.

If child support is a national problem deserving of a federal remedy, then let's go all the way. Let's have the proposed federal wage-garnisheeing law apply only in states with joint-custody laws; there were only 31 at last count. Or let's ask Congress to muster the courage to seriously consider *one* law that would ensure *both* fair child-support payments *and* fair visitation rights.

There is a "new father" out there and many judges and members of Congress are barely aware of it. Modern society tells the "new father" to be in the delivery room when the child is born, to diaper the child, to feed the child, to care in every way for the child. Then, when things go sour in the marriage, presto! The "new father" is expected to instantly and dutifully become the "old father" he never was. Just pay the bills. Mom will handle the rest.

For too long women in our society have been discriminated against for no other reason than because they are women. Fair-minded people have to be against that kind of bigotry. How, then, can fair-minded people ignore, condone or promote discrimination against divorced fathers—100 percent of whom are men—and make believe it isn't sex discrimination? "1984" [illegible] But it doesn't [illegible]

A CBS [illegible] Goldberg lives in New York. I 300 miles away from his seven-year-old son.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 1-25-2015
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'Presumption' & 'Preference': the reasons why.

protecting, & shifting the litigation burden away from the cooperative pare
the childrens' advantage.

BEWARE

Beware of an attempt to convert an altruistic stimulus to seek joint custody into preparations for an acrimonious and litigiously-expensive (lucrative) battle for sole custody through reordering the priority of joint physical custody into merely an option.

REMEMBER:

Merely an 'option' for joint custody triggers a different set of reacti intuitions and intentions. ✲

Ranking joint custody as co-equal with sole custody converts an admirab goal into anguish, apprehension and a defensive resort to self-protection. ✲

Permitting joint legal custody to be substituted in place of joint physical custody deprives a child of equitable physical contact with both parents and burdens the vanquished parent with legal obligations but no equitable physical access to ameliorate those legal problems.

The reasons for 'presumption' & 'preference' for joint custody:

pitfalls of the spectre of litigation.

✲ The theory behind making joint physical custody a presumption (when both parents agree) and a preference (when one parent requests it):

Heretofore, a knowledge by parents heading into trial that a court can, has, or will, decree sole custody requires that both parents prepare t fight each other; it requires they think negatively, it requires that they both defend and attack...a gladiator fight by formerly loving spo for the sadistic amusement and financial income of every courtroom participant whose employment and income rely on family court battles. (Adversary litigation in family/domestic cases usually elicits shame anger, damaged pride and permanent memo ry-scars. Although adversa litigation may have some merit in other civil and criminal cases as mechanism for eliciting 'truth', family law cases have less bearing on 'truth' than with expectations, hopes, moral judgments, and pers security in family relations.

Now, if joint physical custody is known to be a firm requirement of the court as a first preference and a first presumption, then an accepting forgiving, and cooperative parent proposing joint custody need not be required to assassinate the other parent.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 01-30-95
BILL NO. SB 15

Court decrees in response to petitions & requests for joint custody

Four major techniques of diversion away-from and denial of joint custody are being practiced by California courts to deny children and a cooperative joint custody-seeking parent of the advantages of joint custody.

Other methods, than those cited below, are also being used.

These are the primary court methods we have encountered.

The fourth is the latest technique, has been occurring recently in widely separated locations of the state and is one of the most demoralizing and crushing of the techniques.

Methods of Courts

1. Decreeing only Joint Legal Custody

Utilizing one of the more obscure phrases of the joint custody statute (Sec 2. Sec 4600.5 (c) "..may award joint legal custody without awarding joint physical custody") courts have been denying and thwarting equitable "close and continuing" physical "contact" between child and parent by merely decreeing joint legal custody and contending such a decree satisfies the requirements of the law.

Joint legal custody was originally conceived for parents wherein one parent desirous of joint custody may have a far distant occupation and obligation, such as overseas service, and can not be present for frequent physical contact. Nevertheless the courts have been decreeing merely joint legal custody when the divorced parents are as close as the same neighborhood and community.

Nevada placed a legislative restriction on this sham by legislating that merely joint legal custody can be awarded only when both parents agree to such a limitation. Meanwhile nearly every other state considering joint custody, legislatively, is being careful not to provide the "legal" diversionary option.

2. "Best interests"

Arrogating to themselves the decision of whether a parent petitioning for joint custody is, in their interpretation, acting in the "best interests" of the child, judges have been denying joint custody on this grounds

However, such reasons for denying joint custody seem to be decreasing, largely because petitioning parents

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are demonstrating a high degree of conscientiousness about parenting and are not, per se, obvious candidates for denia of joint custody predicated on "best interests"

Parents petitioning for joint custody are also making obvious effort to comply with the definition of "best interests" as stated by Justice Mosk in In Re Marriage of Carney, 24 Cal 3d 725, or 157 Cal Rep 383.

3. "No change of circumstances"

Another significant thwarting of joint custody petitions by the court is occuring in the Bench's recourse to a determination that "there has been no change in circumstances" warranting a change from sole custody to joint custody.

Proponents of joint custody contend that there has been, in fact, a change in the statute law, a series of applicable appeals cases, an on-going change in the child's developmental age, and frequently a change in relationship between the child and the excluded parent warranting a reinsurance of the child/parent relationship.

Although In Re Marriage of Carney, cited above, is primaril a statement of "best interests" as the author, Justice Mosk has reemphasized, the Courts divert into utilizing In Re Marriage of Carney to claim "no change of circumstances."

Severe fallacy in this court justification: Fearing a "no chan of circumstances" by the court, such an apprehension requires that a parent seeking joint custody must, in fact, attack the opposite parent as being unfit, inattentive, derilect, or in some manner not a fit sole custodian in order to attempt joint custody...where upon the court can contend the parent seeking joint custody is not suitable because they obviously bicker and contend with the opposite parent. "Change of circumstances" foments dissension and the search for such reasons rather than encourages joint custody.

4. Decree the phrase; deliberately restrict the intent

With increasing frequency, throughout the state, we are encountering examples similar to the following:

In the Los Angeles County area a parent seeking joint custody was recently delighted with a decree that stated the awarding of "joint physical & legal custody."

The parent indicated they had to pay "dearly" for this complete and undivided phrase, however: Abandoning all claim to a home appraised at $110,000 wherein all but $10,000 had been "paid off." relinquishment of the car valued at $3,700, no claim on any fu sh ings or antiques (the parent was permitted only their personal clothing), the payment of $650 a month child support to the opposit parent (children are a daughter of 11, son-4, parent's employment is modest: a service call employee of the Auto Club)

Forthright implementation of Joint Custody law

Establishing joint custody concept at mediation/conciliation level

Sacramento County Superior Court. Office of Family Court Services, may be unique among California's major jurisdictions in emphasizing the policy, and the intent, rather than deviations from equal joint physical custody.

Having been geographically closer to the legislative debates that resulted in joint custody for California, and with personal interest by legislators resident in Sacramento during the session, it is possible that the Sacramento area is more advanced in its acceptance and preparation for joint custody than implementors in more distant localities.

Following quoted sections are excerpted from an item entitled "Information Regarding Mediation : What to Expect" that is issued to divorcing parents upon entering the judicial process and in advance of mediation, conciliation or formal hearings. (The following items not in quotation marks are our editorial remarks and do not appear in the Sacramento County information.)

SHARING 50% OF THE CHILD'S TIME

Joint custody can be equal sharing of time, if practical for parents and child. Many other jurisdictions have been reluctant to recognize this equality and emphasize, instead, that one parent may have more time than the other, thereby setting-the-stage for apprehension and possible litigation.

"Custody or visitation arrangements range all the way from sole custody to one parent, to joint custody with each parent sharing 50% of the child's time."

ESTABLISHING TWO HOMES AS LEGITIMATE

"Your children will adjust to two functioning homes, providing they are not used as pawns for two ex-spouses to get even with each other."

INVOLVEMENT WITH OTHERS (INCLUDING GRANDPARENTS)

"Each child should be permitted involvement with as many adults as he or she can handle."

JOINT CUSTODY AS FIRST PREFERENCE

"California law requires the Court to award joint custody of children as a first preference. The California Legislature has delcared, "It is public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and in order to effect such policy, it is necessary to encourage parents to share the rights and responsibilities of child rearing." '

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COURT COUNSELOR EXPLAINS JOINT CUSTODY

"...the Family Court Counselor will explain to you the concept of joint or "shared" custody."

PREPARATION OF A JOINT CUSTODY PLAN IN ADVANCE BY PARENTS

"In order for us to offer maximum assistance to you and the children, we request you prepare a joint custody plan."

PARENTS WRITTEN RESPONSE: DETERMINING COOPERATION, ESTABLISHING "REASONS" IF NOT FAVORING JOINT CUSTODY.

"4. Do you favor joint or shared custody? If not, what are your reasons? Be specific."

PARENTS JOINT CUSTODY PLAN SUBMISSION

"5. What do you believe would be a workable joint custody plan?"

THE JOINT CUSTODY ASSOCIATION

10606 Wilkins Avenue
Los Angeles, California 90024
(213) 475-5352
James A. Cook
President

A Nonprofit Association concerned with the joint custody of children and related issues of divorce, including research, information dissemination and legal and counseling practices

awarded in the discretion of the court in other cases." 14
Sec 2. Sec 4600.5 (b) ("Other cases" means cases other than both parents agreeing to joint custody in advance or during court hear

'PHYSICAL' IS INTEGRAL TO JOINT CUSTODY

Physical sharing as befits the circumstances of the parents is the aim. Joint custody that is less than joint physical custody is open to serious question and may be a 'cause of action.'

"..."joint custody" means an order awarding custody of the minor child...to both parents and providing that physical custody is shared by the parents in such a way as to assure the child...of frequent and continuing contact..." Sec 2, Sec 4600.5 (c)

JOINT LEGAL AVALABLE

For a parent unavailable for joint physical custody (by reason of overseas service, for instance) joint legal custody is availabl However, you must be cautioned against having merely joint legal custody imposed unwillingly and sole physical custody awarded to the other parent. (In Re Marriage of Neal, CA 1st, 1 Civ 44100, May 9, 1979: "We accordingly conclude that the overlapping 'joint custody' feature of the award constitutes an abuse of discretion.. ..the award of 'physical custody' to appellant gives her 'custody' which is real...the overlapping feature of 'joint custod in both parties, are ephemeral and essentially meaningless.")

"...such order may award joint legal custody without awarding joint physical custody." Sec 2. Sec 4600.5 (c)

MODIFICATION

Previous custody orders may be modified to joint custody, including out-of-state ordess if they comply with limitations of the Uniform Child Custody Jurisdiction Act.

"Any order for...custody...may...be modified at any time to an order of joint custody..." Sec 2. Sec 4600.5 (e)

COURT MUST STATE REASONS IF IT DOES NOT AWARD JOINT CUSTODY

As an aid to efficient processing of an appeals case to a higher court,...if necessary and an applicant for joint custody so desires....the statute repeatedly requires the court to state its reasons for not granting joint custody (in the context of a policy endorsing frequent and continuing contact) if (1) both parents agree, if (2) one parent petitions for joint custody, if (3) modification to joint custody is requested, and if modification away from joint custody is requested and one parent objects.

Repeating phrase: "The court shall state in its decision the reasons for denial of an award of joint custody." In (1) Sec 2, Sec 4600.5 (a); (2) Sec 2, Sec 4600.5 (b); (3) Sec 2, Sec 4600.5 (c

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Y BRIEF

Jan. 23, '81

Key elements of joint child custody in California.

Following are the significant issues of the statute.

Brevity, however, is no substitute for serious study of the topic. Use this as a guide, but not a substitute, for examination of the statute in its entirety, learning the legislative history of each issue, examining the analytical elaborations that explain the consequences of each issue, and scrutinize current experiences with court implementation.

ICY — Requiring governmentally-employed, tax-paid, fee-paid public servar to encourage joint custody. If such employees are not encouraging joint custody, this might contribute to a 'cause of action.'

"...it is the public policy of this state to assure minor children of frequent and continuing contact with both parents...and to encourage parents to share..." Sec 1, Sec 4600.

IORITIES — In the ranking of choices the law lists "...to both parents jointly....to either parent....If to neither parent, to the person or persons in whose home the child has been living..." Sec 1, Sec 4600, & in subparagraphs (b) (2).

OPERATION — Favoritism to the most cooperative parent if joint custody does not prevail and sole parent custody is required.

"If...an award...to either parent, the court shall consider which parent is more likely to allow the child...frequent and continuing contact with the noncustodial parent." Sec 1, Sec 4600.

AN — You can submit a plan. A plan need not be imposed upon you. A plan becomes evidence of your cooperativeness.

"The court, in its discretion, may require the parents to submit to the court a plan..." Sec 1, Sec 4600. (b) (i).

If the court (in its discretion) refuses your plan demonstrating cooperation and/or imposes a plan which defeats "frequent and continuing contact", you may have a 'cause of action.'

ESUMPTION — Agreeing parents are assured a presumption of joint custody. Agreement can occur during court hearing.

Courts are thereby enabled to encourage agreement to joint custody during the moment of hearing.

The 'presumption' for joint custody occurred because advocates of joint custody found courts denying joint custody and insisting on sole parent custody even when the parents agreed jointly.

"There shall be a presumption affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing..." Sec 2. Sec 4600.5 (a)

ITHER PARENT PRLIES — To encourage cooperation and acceptance (and to elicit awareness of an uncooperative parent) either parent can apply for joint custody.

GOOD NEWS

June 25, 1983
The Joint Custody Association

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About Joint Custody

PREPOSTEROUS

There is no such thing as good news about child support and custody litigation.

Oh yes there is!

A second and new major study* of joint custody performance as compared with sole parent is soon to be issued by

Dr. Howard Irving
Faculty, School of Social Welfare
University of Toronto, Canada

Numerically large sample

200 sets of joint custody parents studied.

Child support

Less than a 6% - 7% default on child support payment by joint custody parents,

as compared with,

72% default on child support payments in sole custody families studied.

Relitigation

Reportedly, the rate of relitigation by joint and sole parents shows a similarly wide difference.

Lack of relitigation is one barometer of comparative satisfaction.

Satisfaction

85% - 90% of the joint custody families report a "highly satistactory" acceptance of joint custody for themselves, and as demonstrated by the chi[illegible]

* A synopsis of the Irving study is being released shortly; the full study thereafter. The Irving study thereupon joins [illegible] support of joint custody, the original analysis of [illegible] custody litigation cases by Alexander, Ilfeld & Ilfeld.

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BILL NO. [illegible]

The joint custody solution.
Preference for joint custody.
Necessity of a rebuttable presumption for joint custody.

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FACE REALITY: OF STATISTICS, TREND, SITUATIO

ALARMING CURTAILMENT OF CHILD'S ACCESS TO THEIR FATHER

One out of three marriages now ends in divorce,
- Up threefold since 1960

Among 'under 30' adults, rate has quadrupled since '60

FATHER ELIMINATION: Dangerous portent for Americans' future

Mother-only, one-parent 'family' is fastest growing US lifestyle

8 million father-excluded "families" now exist

45% of children born today &before reaching 18 can expect to live only with mother if pattern continues

Now: 33% of all US children are living only with mother or with mother and a step parent

Furthermore, many have no brothers or sisters
Fertility rate at all-time low of only 1.8 children for each woman's completed fertility span. Down 40% in two decades.

But, in mother-only 'families' mother isn't necessarily home

55% of all mothers of children under 18 have jobs outside
Up from 30% in 1960

(80% of wives have jobs among childless couples)

90% of all American families are not monogamous, male-breadwinner, multi-child nuclear families

No-fault divorce nationwide means initiating parent must be decreed divorce on demand (plus opportunity of child-coveting) with no justification needed.

THEREFORE:

- Joint custody is the logical first preference to be assumed as a rebuttable presumption unless one parent is shown as harmful.
- Joint custody is the rational solution to preserve a child's access t both parents and curtail the extortion bait of 'going for' sole custo
- Making sole custody merely co-equal with joint custody increases enticement of using sole custody for litigation & extortion threats.

aking payment palatable, not punitive.

INKING PRIORITY AENDMENT CRITERIA

Rebuttable presumption for joint custody.

Joint custody pays,
Reduce sole custody martyrdom

Require states, as a prerequisite for participation in federal program:

that the frequent and continuing access by children of divorce with both parents after the parents have dissolved their marriage will be encouraged by means of a rebuttable presumption for joint custody unless the parents have agreed to sole custody to one of the parents or that joint custody is found harmful to a particular child of a specific marriage.

Joint custody success in child support payment:

- Only 6%-7% default on child support by joint custody parents, as compared with 72% default by sole custody parents in most extensive, recent study thus far.
- Another study: Only 7% of joint custodians relitigating support; but 21% of sole custodians doing so. Only 13% of joint custodians reporting conflict on support, but 34% of sole custodians conflicted. (Center for Policy Research, Denver Custody - Mediation Project.)
- Individual child support dollar payment level running 30% higher than sole custody cases in initial year of joint decrees studied.
- 85% - 90% of joint custody families report "highly satisfactory" acceptance of joint custody for themselves, and as demonstrated by the children in same study.
- Costs to parents, and to court system, reduced: 50% reduction in relitigation of joint custody cases as compared with sole custody.

A feasible Congressional and state action: See House Conc. Res. 6; also, 28 states have joint custody statutes, 13 of those already have required presumption/preference clause to satisfy amendment.

2 Facilitate modification into joint custody. Joint custody is valid "change of circumstances"

Require, as a prerequisite for participation in the federal program:

that each state recognize the establishment of joint custody by legislated statute or precedent decree as amounting to a "change in circumstances" warranting hearing and approval for modifying prior divorce/custody decrees into joint custody.

- The support-payment advantages demonstrated by joint custody are thereby available to parents of prior decrees, to the economic advantage of the state, taxpayers and the children involved.

3 Establish child support base level tables. Basic support schedules

Require, as a prerequisite for participation in federal program:

that each state establish base child support sliding-scale dollar level tables, (keyed to (a) foster parent dollar support levels, and/or (b) AFDC basic support levels, and/or (c) Bureau of Consumer Economics, Department of Agriculture tables for costs of raising a child) thereby removing the inequity of individually litigated child support decrees having no relationship to the costs of raising a child. Assure a base minimum for the child, permitting each parent, thereupon, to spend directly upon the child those additional dollar amounts that reflect the income level of each parent.

- Increase the incentive for each parent to spend funds directly upon ... child.

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SENATE JUDICIARY COMMITTEE

4 Assure availability of visitation for out-of-state removals of children.

No 'taxation without representation'

Require, as a prerequisite for participation in the federal program:

that each state assure, by statute, the continued availability of visitation for a child with both parents, despite a move out-of-state of a custodial parent, by requiring that a child removed out-of-state for more than 90 days must satisfy one of the two following criteria:

1. Agreement by the parents on how visitation for the child will continue on a frequent and continuing basis, or
2. Court hearing to assure continued visitation, despite an out-of-state move, at which the following may be considered:
   a. Adjustment of child support to compensate for additional costs of transportation for out-of-state children.

- Assured visitation, despite out-of-state moves, is the statute law in 11 states.

5 Voluntary agreement achieves better compliance than arbitrary decisions

Agreements before decreements

Require, as a prerequisite for participation in federal program:

that, in those jurisdictions having access to either a private or a publicly-funded mediation or conciliation service, that the parents contesting child support levels or payment will first be directed to resolve the issues and compliance with the aid of a mediator or counselor before proceeding to a formal court of law.

- Parents have demonstrated a substantially better likelihood of compliance with custody, visitation, and support decisions when each has expressed significant input into the agreement or decisions, as compared with the lack of performance in response to arbitrary decrees wherein justifications were expressed solely to a magistrate in order to achieve that magistrate's punitive action upon the alternate parent.

6 Specified percentage of 'parenting time' rather than ambiguous 'reasonable visitation.'

Specificity, not leveraged ambiguity

Require, as a prerequisite for participation in federal program:

that, in cases wherein the parents have not selected nor been decreed joint custody, 'parenting time' allocated to the non-custodial parent will be specified.

Furthermore, in those decrees wherein such 'parenting time' allocated to the non-custodial parent is less than 28.5% of the weekly time (Saturday & Sunday), the court shall indicate the reasons for curtailment of 'parenting time.'

- Curtail the potential for mischief and uncertainty through vague custody decrees which, heretofore, have relegated to the custodial parent the sole power of decision to determine what is 'reasonable' or 'liberal' visitation.

7 Enforceable visitation. No see, no pay

Require, as a prerequisite for participation in the federal program:

that states assure and enforce the continuance and availability of visitation by the children with non-custodial parents with the same vigor as applied to the enforcement and collection of child support from non-custodial parents.

ISOLINA RICCI, PH.D

READING LIST

for your information, from:

James A. Cook
JOINT CUSTODY ASSOCIATION
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*For Clients, **For Clients and Mediators, ***Class Readings

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 01/30/85
BILL NO. SB 1524

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NOTE: For a more extensive and annotated Bibliography, see Folberg, 1984.

THE JOINT CUSTODY ASSOCIATION

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"(Joint custody is) definitely the custody arrangement of the future.

The practice of nearly always awarding custody of children to the mother reflects negatively on women who aren't awarded custody; the public automatically thinks they are unfit to care for the children."

August 28, 1980

Ms Karen DeCrow
Past President, N.O.W., 1974-77

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 01/30/85
BILL NO. SB 15-1-15

TESTIMONY TO MONTANA STATE SENATE, COMMITTEE ON THE JUDICIARY, RE; SB 152, 153

1/30/85

Senators, for the Record, I am Bill Riley from Helena. I am the second generation to experience the divorce process, as I am the child of divorced parents and the divorced, joint custody father of a 6 year old girl. I have been a professional social worker for 15 years and have worked considerably with children and families during this time.

I'd like to start by describing my experience of my parents divorce. It happened in 1960, when I was 10 years old. At that time, divorce was widely recognized as a shameful thing, a sin by the Catholic Church, and something to bring a sort of disgrace upon the family. My parents had no options for the kind of process they used to get divorced and settle the prevailing issues like money and kids. The available system was a win-lose court contest where my mother had the clear edge on legal and physical custody, where she it was expected that she would stay home (as she had been doing) and raise the children, with property and money from my Dad. Before any evidence had been heard by the court, a presumption existed that this arrangement was in my best interest. The only option out of this, for my Dad, was to morally discredit my mother, which he did. My Dad got custody for a few years, until my mother persisted in fighting for a change. Realizing she still had the edge in the judicial system, custody was awarded to her. The fighting, name-calling, allegations, went on for 15 years. During this time, their were no counselors, no mediators, no other options, and as they escalated their "war", their hatred grew. For me, and my brother and sister, the pain was terrible and we soon found that whatever we said hurt one side or the other. Two times, I was forced to chose where the three of us would live. One of those times required me to appear in court and testify whether we wanted to live with my Mom or my Dad. Whichever one I chose, I lost. The losing process continued long into my relationship with my parents and still does today, for me and my siblings. In the end, my sister and I ended up estranged from my Dad, while my brother ended up estranged from my Mom.

In 1982, I found myself being confronted by a seperation and impending divorce, with a two-and-a-half year old girl at home and still in diapers. Besides the normal amount of anger, depression, and shock I felt, I soon learned that there was a system ready to deal with this issue that was identical to the one that had involved my parents. I also learned, as had my father, that when it came to custody issues, the assumptions were still there. The expectation of the courts, and the counselors, was that my ex-wife is the person qualified to raise my child, and that since I must

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make more money, I should provide financial support for that. While attitudes on visitation had become liberalized, and there seemed to be an prevailing attitude that I could see my child, the system was still set up so that only one parent was in charge, the other parent having to fight for any share of the decision-making in the development and raising of her. At least adultery had been thrown out at this point, as a means of substantiating "immorality", but the judicial system was still making a judgement on which parent could serve the best intersets of the child. While the concept of joint custody was being discussed at this time, it was a relative kind of custody. That is, I was presented with the possibility of having alot of decision-making authority, some physical custody (but less than my ex-wife) and even though our salaries were equal, child support. Even though we had reached the point where an out-of-court agreement was written, it was much less than equal in its' division. Exhausted and with no hope of anything better for my daughter and I, I signed. I'd like to tell the committee that I don't pay any child support, and now have my daughter on an equal basis with my ex-wife. The only reason for the lack of a child support order is because she didn't demand it. Both of my lawyers were willing to go along with it but certainly thought it odd. As the years go by, I've come to appreciate her for that more and more. The only reason that I have my daughter as much as I do is because we have reached an suitable arrangement between us. This is not to say that we have become friends. We haven't. We don't communicate well on anything except issues about our child, and have as little other contact as possible. My daughter, from all indications, is a happy, thriving child.

There are several points to be made out of these scenarios. in both instances, the process available to the divorcing parties facilitated a fight between the parents over their child. Their was no option but to prove that the child would be better off with one or the other. When I went to the custody counselor for mediation as a court diversion strategy, the model she used was like a typical labor negotiation model. In other words, the counselor took a look at what I wanted, what my ex-wife wanted, and we ended up with a result that was somewhere in the middle. The problem was that I wanted equity in raising my daughter, while she wanted everything for her and nothing for me. In retrospect, if I had come into the process being unreasonable, at least as unreasonable as she, I would have ended up exactly where I wanted. The sole custody perspective encourages a fight and rewards unreasonable and emotionally punitive behavior on the part of the parents.

Senators, you have been presented with some statistics and some research on this issue today. Behind those numbers, the message is clear. The family is changing. We are experiencing changes in the roles of women in Montana. And while those changes have proven emotionally difficult for men on some

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levels, we now see how beneficial it is to our state to have assertive and competent women contributing in new ways. The role of children is changing. A child used to speak when spoken to, used to always defer to any adult. Now we taech our children in school to learn to judge the behavior of adults. Even the adults closest to them. We tell them when they are being abused and how to protect themselves againest even their parents. We must include the changing role of men in our judicial system in order that our children won't comtinue to suffer. We need to stop applying outmoded values to the family, in our attempts to keep it from changing. We need to allow rewards for parents to work out ways to raise their kids instead of ways to use them to fight with one another.

We need to change the presumption from sole custody to joint custody and in so doing, we will reverse the process for our children. Any system that continues sole custody as an option, even if it's equal with joint custody rewards the fighting mentality. People who are divorcing are nearly always angry, and any encouragement or opening to punish the other parent, is hard to resist. We need to erase that option from our judicial process for those who want to continue to raise their children.

Thank you.

Bill Riley

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SB 152 in essence creates a presumption in favor of joint custody. This presumption will without a doubt create a tremendous amount of new joint custody decrees. It is not our intent to oppose or support this bill or to do battle with the concept of joint custody. We would like, however, to have the opportunity to point out an existing problem that CSEP is presently experiencing with joint custody decrees. This is a problem which will in all probability increase in the same proportion as the passage of SB 152 will increase the occurrence of joint custody decrees.

The legislature in the 1981 session gave express authorization for joint custody decrees and, as a result CSEP has had numerous joint custody decrees referred to it for enforcement work. The problem is that most of these decrees do not include provisions for or even consideration of child support responsibilities. Typically these decrees make some provision for divided residency of the children and some are silent even on residency, they merely state that joint custody is granted. These situations raise the inferences that the expenses for supporting the child are in direct proportion to residency. That is, each parent is to provide for all of the needs of the child while the child is residing with that parent and the other parent would thus have no responsibility for that time period. Another inference that can be raised in these joint custody situations, particularly where no residency is expressed, is that the obligation for support should be divided between the parents in two equal halves. At first glance, what could be more fair than this? Equal shares or proportionate shares seem to fit equitably with joint custody. Our experience, however, is to the contrary.

Since the ever expanding welfare roles have come to national attentions, numerous studies have been conducted to determine why such increases are occurring. The studies have all universally concluded that in the majority of divorces, the women's financial situation deteriorates substantially after the divorce while at the same time, the husband's situation remains nearly the same or sometimes improves. For example, see the study by Doctor Weitzman, "The Economic Consequences of Divorce", 8 FLR 4037 (1982). The reasons for such decline are that the woman generally has a lower earning capacity because of a lack of education, training, or experience. This in turn means that the woman has fewer resources available to her to provide for any child residing with her. Unless sufficient child support is provided to make up the difference, the result is that children become financially deprived and often become recipients of public welfare.

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DATE 1/30/85
BILL NO. SB 152

These studies parallel our observations in CSEP. That is, unless child support is provided, children end up on welfare. Fortunately, at present most divorce cases do include child support provisions. The problem then is just one of enforcement which is quite a problem in itself. Unfortunately, if the trend towards increased joint custody continues we will have a corresponding increase in welfare cases. This is because in the typical joint, custody case, as in all other divorces, the woman is not able to meet the burden of providing her share of the support obligation without assistance. As already stated, in joint custody cases, because they presuppose equal or proportionate division of child support, there is no additional economic assistance due from the father. Without that additional assistance, many of those mothers must resort to public assistance during the periods the child is residing with her. To get that additional assistance for her, to help the mother and child off the welfare roles, the CSEP must expend legal time and effort to establish a support obligation by the father. If there is an increase in joint custody cases as to be expected by SB 152, the cost of CSEP in having to establish new support orders will mirror those increases.

The point of our testimony is that in considering joint custody and divided residency, the parties should not overlook the possibility that child support may be needed by one of the parents in order to accomplish the goal of joint custody. This consideration of child support needs should ordinarily be between the parties and their respective attorneys. However, for whatever the reasons, child support is quite often overlooked, probably because joint custody infers equal financial responsibility. The legislature can at this time while it is generally revising joint custody statutes correct this problem by simply including in the statutes a provision or caveat that child support needs should be addressed in every joint custody decree, that joint custody is in itself not expressive of child support. this inclusion would forestall the inequities CSEP has observed in joint custody cases, and will save taxpayer dollars. And, this would permit the child to have a more comparable standard of living between the two parents. Without this the child may grow to resent having to reside in the home where welfare is the standard.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 1/28/93
BILL NO. SB 152

Senate Bill 152

Proposed amendments:

1. Page 2, line 12 following "custody." delete the "after custody."

2. Page 2, line 13 insert:

"NEW SUBSECTION. (5) In a joint custody proceeding the court shall consider whether a child support obligation is necessary."

3. Page 3, lines 13 and 14, to follow new Subsection (5).

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 6/30/89
BILL NO. SB 152

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 9, 1985

The twenty-fifth meeting of the Senate Judiciary Committee was called to order at 12:10 p.m. on February 9, 1985, by Chairman Joe Mazurek in Rooms 413-415 of the Capitol Building.

ROLL CALL: All committee members were present.

ACTION ON SB 186: Senator Towe moved the amendments attached as Exhibit 1 be adopted. The motion carried unanimously. Senator Brown moved the bill be recommended DO PASS AS AMENDED. The motion carried unanimously.

ACTION ON SB 268: Senator Pinsoneault moved the bill be amended as follows:

Page 2, line 3.
Following: "(1)"
Strike: "(a)"

Page 2, line 5.
Following: "order"
Insert: "or an aftercare agreement"

The motion carried unanimously. Senator Pinsoneault moved the bill be recommended DO PASS AS AMENDED. The motion carried unanimously.

ACTION ON SB 152: Proposed amendments to SB 152 were distributed to the committee (see Exhibit 2). Senator Mazurek stated the standard of serious endangerment is pretty tough. He indicated what these amendments say is we are creating a presumption of joint custody and then one parent would have to come in and disprove that. You are turning the proof standard upside down. Senator Crippen questioned why we were saying this is bad--why should we continue to discriminate against the fathers. Senator Daniels stated the policy over the past is to get the bitterness out of divorce. He believes if you start putting stuff like this back into it, you are going to restore that bitterness. He believes 95% of the time the mother is the better one to raise the children. Senator Pinsoneault stated divorce is the most agonizing, gut wrenching chore a judge has. You have this push and pull all of the time, and the child is always the pawn. If you start out with this presumption, then the judge has some starting point. If you put this language in here, you are turning it back into the situation of the push

and pull. Senator Shaw stated he wants to see this bill stay just exactly the way it is. He is very opposed to the fact the wife or the mother is the only one that can take the kids. Senator Brown stated the language you see here leaves in the idea we presume joint custody, but you don't hold the judge to quite that standard. Senator Towe stated he has some reservations with the Uda amendments. He believes in most divorces, generally, one party ends up not caring very much, and custody is no problem. When there are problems in a divorce, his experience is the wife is going to end up with the best part of the argument, because there isn't a judge anywhere that doesn't favor the wife. He feels if you just say the best interests of the child, the father will lose every time. His suggestion would be maybe just say clear and convincing evidence must be shown. Senator Mazurek believes the judges are going to resist. Senator Mazurek stated we are talking about the presumption and standard of proof. Senator Brown moved amendments Nos. 1, 2, 4, and 5 be adopted, with amendment No. 4 to be further changed to read:

Page 1, line 16.
Following: "unless"
Strike: remainder of line 16 through "parents" on line 19
Insert: "the court finds, under the factors set forth in 40-4-212 by clear and convincing evidence, that joint custody is not in the best interests of the child"

The motion carried with Senators Daniels and Mazurek voting in opposition. Senator Pinsoneault moved SB 152 be amended as follows:

Title, line 7.
Following: "RESIDENCY"
Strike: "TIME WHEN PRACTICAL"

Page 2, line 3.
Following: "parents."
Strike: remainder of line 3 through "equal." on line 4
Insert: "The allotment of time between parties shall be as equal as possible; however, each case shall be determined according to its own practicalities with the best interests of the child as the primary consideration."

Senator Mazurek stated joint custody has two concepts: the technical right to access of records, etc., and the actual physical custody consideration. Senator Pinsoneault stated with this amendment, at least you start out by saying it is half and half. Senator Daniels stated he believes Senator Mazurek has put his finger on it, and that is we need to define joint custody. He believes if we define joint custody, we will be taking away a lot of the problems. The motion to amend carried

with Senators Daniels and Mazurek voting in opposition. Senator Towe moved the bill be amended as follows:

Title, line 8.
Following: "MCA"
Strike: remainder of line 8 through "DATE"

Page 2, lines 13 and 14.
Strike: Section 2 in its entirety

The motion carried with Senator Crippen voting in opposition. Senator Pinsoneault moved SB 152 be recommended DO PASS AS AMENDED. The motion carried with Senators Daniels and Mazurek voting in opposition.

There being no further business to come before the committee, the meeting was adjourned at 1:00 p.m.

Committee Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 2/09/85

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

Uda Amendments SB 152

1. Title, line 5.
Following: "CUSTODY"
Strike: remainder of line 5 through "THE" on line 6
Insert: "IF IN A"

2. Title, line 6.
Following: "CHILD'S"
Strike: "WELFARE IS ENDANGERED"
Insert: "BEST INTERESTS"
Following: "PROVIDING"
Insert: "STANDARDS"
Following: "FOR"
Strike: remainder of line 6 through "OF" on line 7
Insert: "ESTABLISHING"

3. Title, line 7.
Following: "RESIDENCY"
Strike: "TIME WHEN PRACTICAL"

4. Page 1, line 16.
Following: "unless"
Strike: remainder of line 16 through "parents" on line 19
Insert: "the court finds, under the factors set forth in 40-4-212, that joint custody is not in the best interests of the minor child"

5. Page 1, line 22.
Following: "custody."
Insert: "Objection to joint custody by a parent seeking sole custody is not a sifficient basis for a finding that joint custody is not in the best interests of a child, nor is a finding that the parents are hostile to each other."

6. Page 2, line 3.
Following: "parents."
Strike: remainder of line 3 through line 4 in its entirety

7. Page 2, line 5.
Following: line 4
Insert: "(3) To determine the residential schedule of a minor child under a joint custody award, the court shall consider the wishes of the parents, the wishes of the child, the ages of the child, the child's relationships with siblings, the child's school schedule, extracurricular activities and other interests and activities, the distance between the parents' homes, and any other relevant factors. The court shall consider residential schedules which permit the child to have equal time with the parties along with any others urged by the parties, and the court shall determine the schedule based upon the best interests of the child."
Renumber: subsequent subsections

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 020985
BILL NO. SB 152

8. Page 2, line 7.
Following: "may"
Strike: "with the consent of both parties"

9. Page 2, line 10.
Following: "a"
Insert: "residential"
Following: "plan"
Strike: "for implementation of the custody order"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 02-04-93
BILL NO SB 152

P

PROPOSED AMENDMENTS TO SB 152:

1. Page 1, line 14.
Following: "custody,"
Strike: remainder of line 14 through "presume" on line 15
Insert: "it is presumed"

2. Page 2, line 3.
Following: "parents."
Strike: remainder of line 3 through "equal." on line 4
Insert: "This section contemplates an equal residency sharing; however, each case shall be determined according to its own practicalities with the best interests of the child as the primary consideration."

x
The allotment of time between the parties shall be as equal as possible.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 020995
BILL NO. SB 152

Grob

PROPOSED AMENDMENTS TO SB 152:

1. Title, line 6.
Following: "THAT"
Insert: "IT IS AGAINST"
Following: "CHILD'S"
Strike: "WELFARE IS ENDANGERED"
Insert: "BEST INTERESTS"

2. Page 1, line 17.
Following: line 16
Strike: "clear and convincing"
Insert: "substantial"
Following: "the"
Strike: remainder of line 17 through 18 in their entirety
Insert: "child's best interests require sole"

3. Page 1, line 19.
Following: "custody"
Strike: "of both parents"

4. Page 2, line 4.
Following: "allotment"
Strike: "must be equal"
Insert: "should have a reasonable semblance of parity"

5. Page 2, line 13.
Following: line 12
Insert: "(5) In a custody proceeding, the court shall consider whether a child support obligation pursuant to 40-4-204, is necessary."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 02/28/93
BILL NO. SB 152

STANDING COMMITTEE REPORT

February 9 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 152

first reading copy (white color)

PRESUMPTION IN FAVOR OF JOINT CUSTODY EQUAL RESIDENCY TIME.

Respectfully report as follows: That SENATE BILL No. 152

be amended as follows:

1. Title, line 5.
Following: "CUSTODY"
Strike: remainder of line 5 through "THE" on line 6
Insert: "IF IN A"

2. Title, line 6.
Following: "CHILD'S"
Strike: "WELFARE IS ENDANGERED"
Insert: "BEST INTERESTS"
Following: "PROVIDING"
Insert: "STANDARDS"
Following: "FOR"
Strike: remainder of line 6 through "OF" on line 7
Insert: "ESTABLISHING"

3. Title, line 7.
Following: "RESIDENCY"
Strike: "TIME WHEN PRACTICAL"

4. Title, line 8.
Following: "MCA"
Strike: remainder of line 8 through "DATE"

[illegible]

[illegible]

Senator Joe Mazurek Chairman.

SENATE BILL NO. 152

5. Page 1, line 16.
Following: "unless"
Strike: remainder of line 16 through "parents" on line 18
Insert: "the court finds, under the factors set forth in 40-4-212 by clear and convincing evidence, that joint custody is not in the best interests of the minor child"

6. Page 1, line 22.
Following: "custody."
Insert: "Objection to joint custody by a parent seeking sole custody is not a sufficient basis for a finding that joint custody is not in the best interests of a child, nor is a finding that the parents are hostile to each other."

7. Page 2, line 3.
Following: "parents."
Strike: remainder of line 3 through "equal." on line 4
Insert: "The allotment of time between parties shall be as equal as possible; however, each case shall be determined according to its own practicalities with the best interests of the child as the primary consideration."

8. Page 2, lines 13 and 14.
Strike: Section 2 in its entirety

AND AS AMENDED

DO PASS

Senator Joe Mazurek, Chairman

(To be kept current -- post bills when entering, being heard or leaving committee.) Form CS-32

STATUS SHEET

FORTY-NINTH LEGISLATIVE SESSION

COMMITTEE ON JUDICIARY

SENATE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CONCURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CONCURRED IN DATE
SB 105	2/27/85	3/13/85	3/13/85					3/13/85	
SB 110	2/27/85	3/13/85	3/13/85					3/13/85	
SB 119	2/27/85	3/13/85 3/21/85	3/21/85					3/21/85	
SB 132	2/27/85	3/12/85	3/12/85				3/12/85		
SB 144	2/27/85	3/11/85	3/11/85					3/11/85	
SB 151	2/27/85	3/14/85	3/14/85					3/14/85	
SB 152	2/27/85	3/22/85	3/22/85					3/22/85	
SB 184	2/27/85	3/18/85	3/18/85					3/18/85	
SB 185	2/27/85	3/14/85	3/14/85					3/14/85	
SB 186	2/27/85	3/14/85	3/14/85					3/14/85	
SB 200	2/27/85	3/18/85	Died						
SB 230	2/27/85	3/14/85	3/14/85				3/14/85		
SB 235	2/27/85	3/14/85	3/14/85				3/14/85		
SB 298	2/27/85	3/18/85	3/18/85				3/18/85		
SB 314	2/27/85	3/18/85	3/18/85						

STATUS SHEET

FORTY-NINTH LEGISLATIVE SESSION

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 22, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Friday, March 22, 1985 at 8:00 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL NO. 152: Sen. Bob Brown, Senate District #2, sponsor of SB 152, testified and said the main intent of the bill is to change the presumption of the law to favor joint custody. The judge has to presume joint custody in divorce cases unless the judge finds, under the factors set forth in 40-4-212, that joint custody is not in the best interests of the minor child. Senator Brown pointed out that the reason that fathers are oftentimes delinquent in their child support payments is because in so many cases they are not awarded visitation rights. He said in the cases where there is joint custody, child support payments are paid much more often. In closing, Senator Brown said he felt the world would be a better place for both children and parents if this legislation were to pass.

PROPONENTS:

Doug Grob, a member of the Governor's Child Support Advisory Council, testified as a proponent. During most of his testimony, Mr. Grob referred to a document entitled "A Presumption of Joint Custody, Constitutionally Guaranteed." A copy of that particular document, inclusive of his specific references, was marked Exhibit A and attached hereto. He said that it is important to recognize the distinction between joint physical and joint legal custody. If a father thinks he is going to get joint legal custody he still has to do battle in order to obtain access to the child. So, to make joint legal or joint physical at the judge's discretion, you set up a double road block because the joint legal will provide the compromise to the judge between the sole custody and joint custody when, indeed, it really is not. The positive aspects of the child do not occur unless there is at least a 30%, and close to 50%, relationship of that child spending physical time with both parents. He further pointed out that the default on child support in the nation is 72% in sole custody cases. That figure dropped to 6% and 7% in joint custody cases as well as the amount of money paid being 30% higher today in joint custody than in sole custody. He said that consistently across the nation, the major amount of opposition to presumptive joint custody has come from Legal Aide. Legal Aide's caseload is 60-75% nationwide custody and divorce - 99.8% of that custody and divorce is representing women in custody and divorce.

Allan Nicholson, a local businessman who is a member of the State Board of Public Education, spoke on behalf of himself and his children in support of SB 152. He said that he is a joint custody parent and feels that joint custody does work. He said that parenting is a fundamental right; it is not licensed by the State. He also believes that court-ordered counseling in divorce/custody cases is a necessity.

Bailey Molineaux, representing the Montana Psychological Association, said that he supports the concept behind the bill. Research has shown that joint custody tends to be better for the parents and the children, however, he said he did have some concerns with regard to the language on page 2, lines 1-4 and said if there is hostility between the parents, he feels that joint custody could be harmful to the children. He feels that an amendment which would take care of that is on line 18 of subsection (4) if the word "with" were stricken and replaced with the word "without".

Maureen Cleary, a joint custody parent for the past five years, testified in support of the bill. She pointed out that her family has received counseling through the Family Teaching Center and she feels that counseling really does make a difference. She feels that joint custody is in the best interests of the children as it helps them cope with a divorce. She said that joint custody parents have to get to a point in their relationship where they can conduct their affairs in a business-like manner.

Hal Harper, representing House District #44, said that this bill is important for the growth and development of the parent as well as the growth and development of the child.

Helen Grob, representing grandparents of the state of Montana, spoke in favor of the bill. She gave a personal account of what she has experienced as a grandparent concerning her son's divorce.

Janet Lannatta, representing herself, feels that children shouldn't have to live in fear that they may lose one parent in a divorce situation. She said that it is difficult for a child to be cut off from one parent and that it is very important for the child to have time with both parents.

Rep. Rod Garcia, House District #93, strongly urged that the bill be passed.

William Leineweber and his daughter, Wendy Leineweber, both appeared and offered testimony in support of the bill. Wendy feels this bill will help in that it will allow children to spend time with both parents.

Bill Riley, a social worker in Helena, who is also a joint custody parent, spoke in favor of the bill. He said that those who have joint custody understand how it can work for both parents and children. He addressed several misconceptions regarding joint custody. Research has shown that continuity is broken when a child loses a parent. He pointed out that joint custody has been going on for several years and it is not an untested arrangement. He also pointed out that all children, no matter what their age, are affected by the loss of one parent. He said that children do not necessarily accept their step-parent more than they do their natural parent. If they are forced to accept a substitute parent they will resent it. He also said that there is not enough time spent between the child and parent in weekend visitation situations. He also remarked that joint custody can work even though both parents do not agree with the arrangement. He submitted a copy of "Joint Custody as Related to Paternal Involvement and Paternal Self-Esteem" which was marked Exhibit B and attached hereto.

Jerry O'Neil and Dave McLaughlin also spoke briefly in favor of SB 152.

OPPONENTS:

John Hollow, an attorney from Helena who practices family law, testified as an opponent. He said that if the committee elects to pass the bill, he feels that they need to deal with the issue of child support. If there is going to be joint custody, there is nothing in the child support section that deals with the amount of time to be spent with the child. The person with joint custody could be required to pay child support even though they have the child 50% of the time and make 50% of the extended family's income. Secondly, he thinks the committee needs to address what happens should one of these custodial parents move. Thirdly, Mr. Hollow feels that counseling needs to be mandated and it should be something that occurs before the presumption of joint custody arises. He opposes the bill because he feels that the studies that are cited are based on people who had foresight - those who loved their children. He feels that the judges today recognize what these people are saying but he opposes this bill because he feels that leverage would be given to people who do not truly want joint custody. But by asking for it under this presumption, they have leverage; therefore, the nurturing mother then has to give up her child because the ex-spouse demands joint custody. He feels this may be premature. You can't tell people that they are going to be parents - it is a learned art.

There being no further opponents, Senator Brown closed, saying that this is a big and growing social problem that needs to be addressed. He feels this bill is an. attempt to address some of those problems.

The floor was opened to questions.

Rep. O'Hara asked Mr. Hollow if the existing arrangement between divorced parents and custody matters could be affected by this bill. Mr. Hollow said he could not answer that question but said that if the committee truly feels there is a benefit to joint custody, you should not prohibit people who don't have it presently from getting it.

In response to a question asked by Rep. Rapp-Svrcek, Dr. Molineux feels that it should be left up to the parents to work out the living arrangements and the best solution is what they decide and not what someone else decides for them. He further stated that it is best to keep the children in the same school.

Following a few more general questions, the hearing was closed on SB 152.

CONSIDERATION OF SENATE BILL NO. 392: Senator M.K. Daniels, Senate District #24, testified on behalf of SB 392. He said this bill was introduced out of the frustration of the prison staff, the Powell County Attorney's Office and others who deal with persistent felony offenders who are imprisoned in the Montana State Prison and who continue to commit heinous crimes. He said there are no present remedies because most of them are already sentenced to 100 years or more. This bill provides for the death penalty. He feels this is a purported solution to that particular problem. Most of the people he referred to are people that have no chance of being rehabilitated. Sen. Daniels brought to the committee's attention that the Powell County Attorney was unable to testify as a proponent.

OPPONENTS:

John Ortwein, representing the Montana Catholic Conference, testified in opposition to SB 392. A copy of his written testimony was submitted and marked Exhibit C which is attached hereto.

Catherine Campbell, representing the Montana Association of Churches, said that they are opposed to the death penalty. She said she doesn't believe this legislation is conducive to justice and has the potential of being unfairly imposed.

Roy Andes, an attorney practicing in Helena and representing the American Civil Liberties Union, testified in opposition to the bill. He said that the ACLU has been consistently opposed to the death penalty. He said that the ACLU has traditionally been a litigating organization. In this state, 80% of the time, the ACLU has been successful in winning their lawsuits. He said this bill is fatally flawed. He feels that the bill has three constitutional flaws offending three

was seconded by Rep. Gould and further discussion was held. In response to a question by Rep. Mercer, Rep. Brown said that the reason for his amendment was because he doesn't feel that the children under 12 belong in the same category even if they are treated with the discretion of the judge in any fashion, shape or form. He feels they need to be dealt with totally separate outside all the other people who may fall in this category. Rep. Miles asked where they would be treated. Rep. Brown said the Boy's Ranch is a possibility or the court may send them out of state to another facility. He said that these would be very rare cases. Rep. Hannah informed the committee that the Boy's Ranch has a very tight security and home environment to deal with specific emotionally disturbed children. It is his view that it is an excellent facility and he feels this is an example of the kind of facility that will handle the under 12 year olds. In response to another question of Rep. Mercer, Rep. Brown said that since we set the age limit of the youth court in section 103, he thinks the language should reflect 12 and over.

The question was called on the motion to amend and it carried unanimously. (See standing committee report for complete amendments.) Rep. Hammond moved that SB 411 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Darko and carried unanimously. Rep. Waldron will carry the bill.

ACTION ON SENATE BILL NO. 152: Rep. Gould moved that SB 152 BE CONCURRED IN. The motion was seconded by Rep. Hammond. Rep. Addy moved to amend page 2, line 18 following "may" by striking "with" through "parties". The motion was seconded by Rep. Hammond. In response to a question asked by Rep. Rapp-Svrcek, Rep. Addy doesn't feel that counseling should be made mandatory in all cases. The question was called, and the motion to amend carried unanimously. Rep. Hammond moved that SB 152 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. O'Hara.

Rep. Krueger moved a substitute motion to kill the bill. There being no second, the motion failed.

Rep. Mercer moved to amend page 2, line 7 following "that the" insert "physical custody and". The motion was seconded by Rep. Keyser and carried unanimously. Rep. Mercer further moved to amend page 2, line 8 following "be" strike "shared by" and insert "allotted between". The motion was seconded by Rep. Gould and carried unanimously. Rep. Mercer further moved to amend page 1, line 21 following "40-4-212" by striking "BY" through "EVIDENCE" on line 22. The motion was seconded by Rep. O'Hara. Rep. Mercer said that a preponderance of evidence is standard in all civil cases. He is afraid that if placed here, it suggests that the standard always has to be met. Rep. Mercer said that if that language is deleted, standard is automatic. He feels this language is sloppy drafting. Rep. Krueger said that Rep. Mercer is correct that by striking this language it will still leave it the same. The question was

called on the motion to amend, and it carried on a voice vote.

Rep. Hammond moved that SB 152 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Keyser and further discussed.

Rep. Krueger said that by passing this bill we are basically changing the standards. Right now, we do have the "best interest" standard. We are trying to change the standard by saying that there is a presumption of joint custody. He feels the court should be able to look at the best interests of the child. He feels this is the standard that we should continue to maintain. Rep. Addy feels that in this particular field, as long as you don't state a presumption of joint custody, those stereotypes will be acting on the players of the game. He feels that by stating joint custody as a presumption you have made the process neutral. Rep. Krueger's last comment was that he feels that the hostility factor can clearly not make this a workable bill.

The question was called, and the motion carried with Rep. Krueger dissenting.

ACTION ON SENATE BILL NO. 28: It was Rep. Hannah's feeling that the committee should adopt the amendments as proposed by Senator Mazurek. A copy of those amendments are attached and marked Exhibit D. Rep. Darko moved that SB 28 BE CONCURRED IN. The motion was seconded by Rep. Hammond. It was brought out that these particular amendments are acceptable to those particular tribes to which they were sent for review. Correspondence relative to this bill was marked as a package (Exhibit E) and attached hereto.

Rep. Hammond moved that the committee adopt the proposed amendments. The motion was seconded by Rep. O'Hara and carried on a voice vote. Rep. O'Hara further moved that SB 28 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Miles. The question was called, and the motion carried with Rep. Keyser dissenting. Rep. Hannah will carry the bill on the floor.

ACTION ON SENATE BILL NO. 392: Rep. Hammond moved that HB 392 BE NOT CONCURRED IN. The motion was seconded by Rep. Darko. Rep. Keyser moved a substitute motion that SB 392 BE CONCURRED IN. The motion was seconded by Rep. O'Hara. Rep. Rapp-Svrcek moved to amend page 1, line 13 following "prison" by striking "has been determined to be a persistent felony offender". The motion was seconded by Rep. Hammond, and it failed due to a tie vote. (See roll call vote.)

Rep. Addy moved to amend page 1, line 18 following "homicide," by striking "mitigated" through "assault,". The motion was seconded by Rep. Miles and discussed. He said this amendment would limit the number of offenses whereby a person could be sentenced to death. He further said that he has a problem with

STANDING COMMITTEE REPORT

March 22 19 95

MR. Speaker

We, your committee on Judiciary

having had under consideration Senate Bill No. 152

Third reading copy (Blue color)

PRESUMPTION IN FAVOR OF JOINT CUSTODY EQUAL RESIDENCY TIME

Respectfully report as follows: That Senate Bill No. 152

be amended as follows:

1. Page 1, line 21.
Following: "40-4-212"
Strike: "BY" through "EVIDENCE" on line 22.

2. Page 2, line 7.
Following: "that the"
Insert: "physical custody and"

3. Page 2, line 8.
Following: "be"
Strike: "shared by"
Insert: "allotted between"

4. Page 2, line 12.
Following: "may"
Strike: "with" through "parties"

DO PASS
AND AS AMENDED,
BE CONCURRED IN

REP. TOM HANNAH, Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY